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THE POLITICS OF EXTRATERRITORIALITY:

A HISTORICAL SOCIOLOGY OF

PUBLIC INTERNATIONAL LAW

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THESIS SUBMITTED FOR THE FULFILLMENT OF THE DEGREE OF DOCTOR OF PHILOSOPHY IN
INTERNATIONAL RELATIONS
UNIVERSITY OF SUSSEX

SEPTEMBER 2012

I hereby declare that this thesis has not been submitted, either in the same or different form, to this or any other university for a degree.

Signature:.....

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During these last five years, many people looked terrified after asking me what this project consisted of. But this was not just a reaction to my confused answers. Most of them swiftly interjected, 'you should have done this at the end of your career, not the beginning!' It is, apparently, logically evident to leave long-scale history to one's retirement age. Thankfully, the people that follow (and many I will have forgotten) have done their best to make sure my ignorance of this 'fact' does not prematurely end my intellectual journey.

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SUMMARY

This dissertation develops a historical and theoretical reconstruction of the category and praxis of extraterritoriality in the fields of International Relations and Public International Law. The analysis first addresses the dominant Neo-Liberal tradition and its focus on the concept of 'judicial globalisation', before engaging with critical and Marxist studies that rely on imperialism and capitalism as explanatory phenomena.

In response, the thesis argues that extraterritoriality is a political process, covering a set of jurisdictional struggles determined by contested social property relations. As legal strategies of accumulation, these struggles can neither be explained by a chronologically and discursively progressive deterritorialising world order, through which they emerge as depoliticised events, nor by structural and functional theories of capitalist or Western imperialism that narrowly assume their logic and behaviour.

This argument emerges from the analysis of three historical case studies: 16th to 17th century Spain, 17th to 18th century France, and 19th century Britain. Each case, set in its international context, evinces the role of specific intellectual debates, juridical institutions and legal strategies of accumulation in shaping contending extraterritorial regimes and legal world orders.

Thereby, the thesis reformulates a Political Marxist approach as a historical sociology that places the actors and politics of international legal processes at the forefront of the history of Public International Law. This approach enables a non-determinist understanding of contemporary extraterritoriality. It dissociates its analysis from a naturalised history of judicial globalisation and from a monolithic history of capitalism, to resituate extraterritorial practices in a more open and contested field in between those of International Relations and Public International Law.

In conclusion, examining the politics of extraterritoriality exposes Public International Law as a practical site of struggle between legal strategies of expansion, accumulation and resistance. This historical and theoretical reconstruction asserts the political legitimacy and agency of otherwise excluded legal actors and ideas, affected by and involved in the multiple transitions in the forms of sovereign jurisdiction and territorial control.

LIST OF ABBREVIATIONS

ACTA	Anti-Counterfeiting Trade Agreement
ATTAC	<i>Association pour la Taxation des Transactions financières et l'Aide aux Citoyens</i> (Association for the Taxation of financial Transactions and Aid to Citizens)
BRICS	Brazil, Russia, India, China, South Africa
CLS	Critical Legal Studies
DPE	Droit Public de l'Europe
ECHR	European Court of Human Rights
ECJ	European Court of Justice
G8	Group of 8
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IL	International Law
IOJT	International Organization for Judicial Training
IPR	Intellectual Property Rights
IR	International Relations
IR/IL	International Relations / International Law
MEJA	Military Extraterritorial Jurisdiction Act
NGOs	Non-Governmental Organisations
OECD	Organisation for Economic Co-operation and Development
PROTECT IP (PIPA)	Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act
PM	Political Marxism
SOFA	Status of the Forces Agreement
SOPA	Stop Online Piracy Act
TRIPS	Trade-Related aspects of Intellectual Property Rights
TWAIL	Third World Approaches to International Law
UN	United Nations
UK	United Kingdom
U.S.	United States of America
WTO	World Trade Organisation

TABLE OF CASES, TREATIES AND OTHER LEGAL INSTRUMENTS

TREATIES AND OTHER LEGISLATION

Siete Partidas 1256-65

Pope Alexander VI Bull of Donation 1493

Treaty of Tordesillas 1494

Laws of Toro 1505

Laws of Burgos 1512

Requirimiento 1513

Treaty of Saragossa 1526-9

Papal Bull *Sublimis Deus* 1537

New Laws of the Indies 1542

Treaty of Saragossa 1542-43

Treaty of Cateau-Cambrésis 1559

Nueva Recopilación de Leyes de España 1567

Treaties of Westphalia (Muenster and Utrecht) 1648

Navigation Acts 1651

Recopilación de Leyes de Indias 1681

Treaty of Paris 1814

Congress of Vienna 1815 (Aix-la-Chapelle 1818, Troppau 1820, Laibach 1821, Verona 1822)

Foreign Jurisdiction Act 1843

Treaty of Paris 1856

Convention for the Red Cross 1863

Convention for the Universal Postal Union 1875

Berlin Conference 1884-85

San Francisco Conference 1945

UN Charter and Statute of the International Court of Justice 1945

Universal Declaration of Human Rights 1948

Restatement (Second) Foreign Relations Law of the United States 1965

Restatement (Third) Foreign Relations Law of the United States 1987

Helms-Burton Act (Cuban Liberty and Democratic Solidarity Act) 1996

D'Amato Act 1996

MEJA 2000

TRIPS 1994-2001

ACTA 2011

SOPA 2011

PIPA or PROTECT IP 2011

CASES

American Banana Co. v. United Fruit Co. 213 U.S. 347 (1909)

The SS Lotus (France v. Turkey) P.C.I.J., Ser. A, No. 10, (1927)

ALCOA (United States v. Aluminium Co. of America) 148 F.2d 416, 2d Cir. (1945)

“To trade with civilized men is infinitely more profitable than to govern savages.” 1833,
Thomas Babington Macaulay
(First Law Member of the Governor-General's Council in India)

INTRODUCTION

The history of extraterritoriality has witnessed many a rise and decline. Its thread is traceable from ancient treaties in the Mediterranean basin, late medieval Capitulations in the Ottoman Empire, to British extraterritorial courts in the late 19th century Middle East, Asia, and Africa. Recently, extraterritoriality has reappeared as part of a transnational regulatory boom mostly driven by acts and cases emerging from the United States (U.S.).

This history is a rich but neglected resource for understanding how the relationships between international legal actors and processes shape contending international orders. Specifically, it provides us with an alternative genealogy of these orders, which puts the spotlight on actors and processes at the political margins of international legality and legitimacy.

Concepts for grasping these processes and orders have shifted between theories of hegemony, imperialism and most recently, globalisation. To assess these theories and their impact on International Relations (IR) and International Law (IL)¹, the present dissertation is concerned with the developments of extraterritoriality since the 16th century. Though it does not claim to provide an exhaustive account of extraterritorial regimes from this period onwards, it analyses transitions between such regimes, their socio-political contexts of origin, and their implications for 16th to 19th century international relations.

These findings suggest new hypotheses concerning the early modern development of public IL. Specifically, the strategies used by early modern European empires to extend their jurisdictional reach give us valuable insights into the historical sociology of public IL. These consist in explaining the differences between such strategies in terms of concepts of accumulation. Furthermore, these concepts are intended to shed light on the increasingly constitutive role of extraterritoriality in the contemporary global order.

The example discussed below illustrates the new rise of this practice. The extract belongs to a letter signed by various European dignitaries, protesting against plans to increase the legalisation of internet activity. Surprisingly, though, the letter is not addressed to European legislative bodies but to the U.S. Congress:

“We, Members of the European Parliament, civil society organizations and businesses would like to draw your attention to the extraterritorial effects of current intellectual property rights (IPR)

¹ The acronym ‘IL’ refers to both the discipline and practice of international law. This is in accordance with its use in the existing academic literature, thus denoting the interdependence of legal academia and legal practice. In contrast, but also in line with existing academic literature, the discipline of International Relations will be referred to as ‘IR’, whereas the expression ‘international relations’ will be retained to refer to the ensemble of social relations that cross the boundaries of sovereign entities. As is broadly accepted from its wide usage, the meaning of the term ‘international’ in this expression has gone beyond the actual historical limits of its components (i.e. it is not limited to relations between nations, *stricto sensu*, but equates instead to transhistorical terms such as ‘inter-societal’).

enforcement acts being proposed in the US Congress. The two houses are expected to vote on the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PROTECT IP) and the Stop Online Piracy Act (SOPA). (...)

We are concerned that SOPA and PROTECT IP will be detrimental to internet freedom, internet as a driver for economic growth and for fundamental rights, not only in the EU, but globally. The legitimate aim is to halt infringements of intellectual property rights online. However, since the internet is used for nearly every aspect of citizens' lives, business activity or government regulation, the effects of these acts will lead to enormous collateral damage.” (Members of European Parliament *et al.*, 2011: 1)

SOPA and PIPA (short for PROTECT IP) are national derivatives of the Anti-Counterfeiting Trade Agreement (ACTA) signed by the World Trade Organization (WTO) in May 2011, in follow-up to the 1994 and 2001 Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS). At the time of writing, September 2012, neither act nor treaty has been fully endorsed. If the U.S. Congress is still divided on SOPA and PIPA, the European Parliament has fully rejected ACTA (Lee, 2012; Meyer, 2012)². This stalling in the ratification procedure has been brought about by a series of online campaigns, street protests, ‘hacktivism’, and lobbying by various political and economic actors, of which the above letter is one example.

This story illustrates a conventional premise of contemporary analyses in IL, namely their appeal to converge with IR theory (Slaughter, 1993; Beck, 2009; Çali, 2010). This academic trend has steadily developed since the early nineteen nineties, particularly in Anglo-American academia. Its primary aim is to bridge the gaps of disciplines, policy and practitioners in law and politics, with as backdrop the informal and institutional expansion of the global liberal order.

Specifically, the above example highlights the problem of extraterritoriality, a more neglected aspect of IR and IL convergence. The debates and protests concerning the potential application of SOPA and PIPA show the rising stakes of the practice of extraterritoriality in a potentially ‘new world order’ (Slaughter, 2004). Why do European actors need to openly plead the U.S. Congress? Does this signify a major shift in definitions of sovereignty? Considering such a shift has justified a more interdependent research program in IR and IL, albeit one in accordance with a neoliberal theoretical agenda, these questions are of crucial importance for both disciplines.

To answer these concerns, this dissertation suggests undertaking a historical sociological detour into early modern jurisdictional practices. A second suggestion consists in developing theoretical tools from this history so as to account for the above contemporary

² Agreements and treaties signed by the WTO require parliamentary ratification by a sufficient number of states in order to come into force.

problems from a more critical perspective.

The following section discusses the contemporary context of extraterritoriality in more depth. The second section lays out the problem of understanding its politics, while the third puts forward the present thesis, namely the historicisation and reconceptualisation of extraterritoriality as a process of capitalist accumulation *and* jurisdictional struggle. To present the main implications of this argument, a fourth section introduces the theoretical approach hereby developed, followed by an overview of the case studies, findings and analytical foundations discussed hereafter. The introduction will close with a chapter-by-chapter plan of the structure of the dissertation.

The Rise of Extraterritoriality

Extraterritoriality refers to the increased transnational activity of domestic courts and to the increased legislative activity of governments over matters outside their state's jurisdictional limits. The ability to make claims and prosecute individuals and organisations in different judiciary systems has been considerably expanded and made more complex. This has led to a multilayered map of the international legal order with overlapping and novel connections between different jurisdictions, domains of legal activity and legal systems. Although primarily lead by the U.S., this practice is now being pursued by other states in Western Europe, and in Canada, Australia, South Africa and Japan (Parrish, 2008: 1458-1459).

Prima facie, the worldwide increase of extraterritorial acts is indicative of institutional and 'transgovernmental' shifts in the contemporary legal order. These shifts consist in the increased interaction between national administrative and judicial actors, and have been subsumed under the concept of 'judicial globalisation' (Slaughter, 1994; 2000). The contemporary actors of judicial globalisation are a large and varied group composed of states, domestic courts and lawyers, international courts and lawyers, international organisations, transnational companies, Non Governmental Organisations (NGOs) and both public and private individuals. These new judicial networks affect the education and practice of judges, who more and more often refer to foreign decisions and rules in their proceedings. Judicial globalisation hence refers to a new stage of international legal order constituted of liberal states institutionally bound by *ad hoc* transgovernmental relations and shaped by the increasing role of economic organisations and private IL.

The cases of SOPA and PIPA consist in the extraterritorial application of domestic, in this case U.S. legislation. Members of the European Parliament and various European actors fear their 'collateral damage' on business and fundamental rights. This has led them to openly address and alert the U.S. Congress to the substantive content of the acts. Indeed, it

is important to note that the signatories to the letter do not 'officially' contest the extraterritoriality, i.e. the form, of the acts. This of course does not preclude the fact that the European Union (EU) is critical of the extraterritorial reach of U.S. legislation, as previous conflicts over this issue have shown more explicitly (Born & Rutledge, 2007: 223). However, it does point to the fact that extraterritoriality might now be too embedded a legal mechanism to be disputed in its form. In addition, and to illustrate the concept of judicial globalisation, the case of ACTA shows the increased legislative role of the WTO, a quasi-judicial international organisation based on the negotiation of economic trade relations.

In other words, these acts are not the typical products of the post-1945 international legal order. Enshrined by the 1945 San Francisco Conference, this order established, through the United Nations (UN) General Assembly and UN Charter, the quasi-universal legitimacy of UN institutions over international matters. After the failures of late 19th century liberal idealism, and its 1919 League of Nations to prevent the Second World War, the post-1945 order had to change its course. The UN Charter aimed to strike a balance between two aims, the need for politics to be reined in by legally objective rules, and the need to account for the more subjective reality of a new political world. This world was characterised by an increasing number of states, but also by non-European rights and peoples pushing for more individualist principles of legitimacy.

For this second aim, the Charter reinforced the right to self-determination and secession (Art. 1.2), but also the rights to self-defence by member states and the right of the Security Council to take measures against threats to the peace and acts of aggression (Chapter VII). Moreover, the Charter was swiftly followed in 1948 by the Universal Declaration of Human Rights. Through these measures, the road was explicitly opened to contest the classic 'Westphalian' concept of sovereignty as basis to IL. However, the Charter also upheld the first aim of legal objectivity by reasserting the principle of sovereign independence and jurisdictional integrity (Art. 2):

"The Organization is based on the principle of the sovereign equality of all its Members." (Art. 2.1)

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." (Art. 2.7, UN Charter)

Thus, the post-1945 UN legal order remained premised on a legal conception of absolute sovereignty, albeit open to exceptions regulated by UN institutions. Certainly, this order was soon trumped by the political exigencies of the Cold War and post-1960s Anglo-American pragmatism (Koskeniemi, 2001: 413-510). But the characteristic indeterminacy of

IL remained, oscillating between legally-based and politically-based definitions of sovereign independence (Koskeniemi, 2005). In addition, the workload and global presence of UN-based institutions increased significantly, particularly after the end of the Cold War³.

Today, however, this definition of sovereignty is challenged in academic circles by the rise of extraterritoriality and judicial globalisation⁴. The opening example shows but one practical implication of this debate, affecting international, transnational and domestic spheres of Intellectual Property Rights (IPR) law. In more general terms though, it seems pertinent to ask to what extent extraterritorial practices affect sovereign jurisdiction. Significantly, who are the actors driving and affected by these practices?

These two questions can be subsumed under the more general problem of *the politics of extraterritoriality*, which will be broken down into two steps. Firstly, why is extraterritoriality considered a novel strategy justifying judicial globalisation? And secondly, if, as this dissertation argues, such claims are problematic, how can we make better sense of the relationship between extraterritoriality, international actors and legal orders?

The Problem of Politics

Existing analyses of extraterritoriality can be summarised as follows⁵. First, mainstream accounts⁶ trace back 21st century extraterritoriality to the Westphalian era, as a recurrent strategy for the management of legal differences between sovereign states (Raustiala, 2009). Two major aspects from these mainstream accounts can be discerned. Firstly, they *empirically* attribute the current order of judicial globalisation to a natural progression of the modern European states system. In this narrative, the different cases of extraterritoriality play similar functions consisting in regulating and balancing relations between states. Secondly, they *normatively* posit that judicial globalisation presents a new and welcome model for international relations, adapted to economic globalisation, rising networks and global threats. Extraterritoriality is here presented as an 'interface', amenable to the shifting boundaries between public and private, international and domestic structures associated with the more

³ Notwithstanding, leading states remain reluctant to fully endorse the role of international legal institutions, as in the cases of the U.S., Russia and China still refusing to officially acknowledge the International Criminal Court (ICC).

⁴ This debate has been steadfastly developing out of the U.S. since the late 1990s. For example: "In recent years in the United States, constitutional reasoning and practice has been going global." (Kersch, 2005: 345). Such opening statements have become commonplace in IL journals. See chapter one for a more detailed review of the 'judicial globalisation' literature.

⁵ It should be made clear that the following summaries are merely introductory and preliminary accounts. They are reduced to their most striking and essential features, and do not claim to be exhaustive or do justice to the variety of positions in each set of literature. See chapter one for an in depth analysis of mainstream and critical historiographical accounts, and chapter two for historical materialist accounts.

⁶ This study focuses on what will be designated as Neoliberal Institutional approaches, and refers to work by liberal international lawyers that develops neoliberal IR theories, such as in Abbott (1989), Slaughter (1993), and Keohane (1997). These approaches have been identified under the acronym of IR/IL (Slaughter & Ratner, 1999).

and more defunct post-1945 order. This categorisation is conjunctural and sociologically barren. It is divorced from historical analysis and refers to extraterritoriality as a neutral mechanism impervious to social and ideological influences.

These two aspects elide an understanding of the politics of extraterritoriality. Mainstream analyses combine these aspects to account for continuity and change in extraterritorial processes and legal orders. Contradictions between their implicit assumptions force us to question their propensity to assess the different class interests and social dynamics behind such processes. Two concepts of structure are provided, one functional and one formal, but an explanation of how each respectively drives the continuities and changes in international legal orders is lacking. Firstly, their empirical analyses claim that the contemporary system is structurally (i.e. functionally or 'logically') coherent with a past European, i.e. international, political and legal order. Secondly, they normatively claim that the institutional (i.e. formal) structure of the international legal system can and must adapt to changes in the global economy. This implies that the function and form of extraterritoriality are respectively distinguishable along the lines of a historically fixed and continuous political sphere, and a historically open and indeterminate economic sphere.

The following chapter analyses these narratives in more detail, and concludes that they fail to deliver on causal, normative, political and historical grounds, as they obscure the multitude of concrete social relations that constitute these shifts. Consequently, assessing the political implications of extraterritoriality is hindered by an assumed historical separation between political structure as function and economic structure as form. In other words, the politics of extraterritoriality are lost in between two narratives of economic and political orders.

Secondly, critical accounts are also problematic in their conceptualisation of structure. Though these accounts differ significantly, ranging from Post-colonial, Post-modern to Marxist interpretations, it is possible to simplify them for the present purpose as homogenising the processes of imperialism and capitalism. In these narratives, judicial globalisation is understood as the latest form of hegemony or imperialism, i.e. as the latest manifestation of dominant discursive legal arguments and socio-economic imperatives. Hence, when extraterritoriality is included in these analyses, as an object of inquiry, it is assumed to constitute one of many legal resources of territorial extension deployed by hegemonic or imperialist states, with no significant historical role or trajectory⁷. In some cases, critical accounts are theoretically ill equipped to answer the problem raised above because of their overly homogeneous concepts of international legal orders and legal strategies (e.g. Miéville, 2005, Kayaoglu, 2009). They fail to take the differential dynamics of

⁷ For such an exception, see Kayaoglu (2009).

regional political, economic, social and jurisdictional trajectories seriously. In the best cases, they have not sufficiently pondered on the relevance of extraterritoriality for understanding the historical relationship between IL and capitalism (e.g. Koskenniemi, 2001; Cutler, 2003; Neocleous, 2012).

A Historical Sociology of Public IL

In order to overcome the deficiencies in the above sets of literature, the dissertation embarks on a historical journey into the potential significance of extraterritoriality. The central condition of this investigation is the need to account for the contested politics of different extraterritorial regimes, by avoiding a naturalised and post-Westphalian linear narrative, but also a monolithic history of capitalist structures of power.

To this end, firstly, the concept of extraterritoriality is categorised as an *institutional and discursive*⁸ *legal strategy of territorial and jurisdictional expansion*⁹. If sporadically recurrent and mostly ignored by historiography, 'legal strategies of expansion' are nevertheless fundamental to the extension and restriction of power in various geopolitical settings. Through this conceptually broader comparative framework, different trajectories are found between and across extraterritorial regimes. These trajectories need to be mapped out against existing histories of successive international legal orders.

Secondly, if these politics lie in attempts to extend the limits of jurisdiction through military force (invasion and colonisation) and/or legal argument (treaties), it is argued here that such extensions are particular processes of *accumulation*, i.e. formalised or systematic processes of exploitation of land and peoples. In addition, the dissertation argues that these processes, if identified as legal strategies of expansion, are produced by, and result in *jurisdictional struggles*.

Concretely, this framework allows us to account for how accumulation takes on different legal forms but also for how jurisdictional struggles provide ground to question the conditions of political legitimacy. In short, these two concepts account for the politics of extraterritoriality. Thereby, this thesis proposes an alternative theoretical approach, couched in a broader historical sociological framework.

Specifically, this framework consists in a reformulation of Political Marxism (PM). Originating in the historical works of Robert Brenner (1976) and Ellen M. Wood (1981), PM

⁸ This study will use the terms 'discursive' and 'discourse' in a more general sociological sense, i.e. without the more substantial theoretical connotations these terms have gained through the development of Post-modern or Post-structuralist theories. It is acknowledged that this use could be problematic without further discussion, but it follows the precedent of existing studies such as Bachand and Lapointe's (2010), whose concept of 'law as argumentative practice and legitimizing *discourse*' is built upon in chapter two. In effect, the terms 'discourse' and 'discursive' refer here to intellectual debates and legal-political thought.

⁹ The expressions 'legal strategies of expansion' and 'juridical expansion' will subsequently be used as shorthand for the ensemble of these processes.

sets itself as a particular Historical Sociology that moves away from structural and economistic Marxism. Concerned with the specificity and multiplicity of contested regimes of social property relations, this Historical Sociology also distances itself from Weberian and neo-Weberian strands. It focuses on the determining role of specific struggles between social classes, across regimes of property relations, to understand broader processes of state formation and socio-economic transitions. For example, these early studies focused on the social relations involved in the various transitions to capitalism (agricultural and industrial), particularly in Western Europe. A crucial implication of focusing on regimes of social property relations consists in the identification of, and comparison between, concepts and institutions of property, in terms of property rights, the legal principles and customs establishing the individuals and groups entitled to such rights, and the institutions built to uphold them. Thus, an underlying premise of PM is the analysis of legal regimes and their constitutive role in transitions between modes of production.

The choice of this approach is firstly vindicated by the nature of the problems found in mainstream and critical accounts of the rise of extraterritoriality, i.e. the lack of political and social determinations on the one hand, and the homogenising role of structures of power on the other. In effect, PM proposes a critique and solution to both these problems, by its focus on politics and specificity.

A second motivation behind developing this strand of Historical Sociology is its lack of direct engagement with the legal dimension. In the last twenty years, scholars in IR and International Political Economy, such as Rosenberg (1994), Teschke (2003), Lacher (2006) and Knafo (2007), have transposed the work of Brenner and Wood for their disciplines. A primary challenge for these studies has been accounting for the international dimension of modes of production and legal-political systems. However, albeit for two exceptions (Comninel, 2000; Bachand & Lapointe, 2010), these analyses have not directly explored the international dimension of law, whether in terms of the construction of IL per se or in terms of the expansion of domestic and regional legal systems. In response, this dissertation reconsiders and reformulates some of PM's key concepts and arguments in light of the history of extraterritoriality and public IL.

In sum, the present contribution strives to maintain a Marxist critique of IL while developing a discussion of extraterritoriality as an agential process. This implies a non-structuralist conception of IL – and of the category of extraterritoriality within it – as neither derived from a 'Westphalian' notion of absolute sovereignty, nor from a notion of capitalism as a pan-European phenomenon. Concretely, this historical sociology explores three case studies: 16th to 17th century Spain, 17th to 18th century France, and 19th century Britain. Two principal reasons lie behind the choice of these states. Firstly, they are conventionally depicted as leading the three successive hegemonic orders crucial to the development of

modern IL and the sovereign states system¹⁰. Specifically, Grewe's seminal work (2000) makes important claims concerning the successive role of these states and their empires. It therefore seemed judicious to build on this respected historiographical resource to explore the history of extraterritoriality. Furthermore, as will become apparent, a critique of some of its assumptions and state-led epochal structure is required.

Secondly, PM makes strong claims concerning the differences between France and England's legal regimes for the development of capitalism in Europe. Specifically, their role is differentiated by the emergence of capitalism in the agrarian transformations of early modern England (Comninel, 2000). Having considered the potential of PM to bring an added social and political dimension to existing histories of IL, and considering also the secondary concern of the research, i.e. examining the role attributed to juridical institutions and struggles in PM analyses, it became necessary to contrast them with the less discussed but no less fundamental experience of Spain. This comparative exercise, aimed at enriching and testing PM's arguments, is a timely effort considering the renewed interest in the influence of early modern Spain's empire but also of its key thinkers, such as Francisco de Vitoria, as founders and builders of the IR and IL disciplinary canon.

Before looking at these case studies in more detail, it is necessary to clarify how the study operationalises this historical sociology of public IL.

Analytical Foundations

In contrast to mainstream and critical analyses of extraterritoriality hereby reviewed, the present history postulates IL as a loose ensemble of social processes rather than a neat and stylized succession of structural orders. However, it is important to recall that IL more generally denotes a private and public body of treaties, conventions, acts, norms and doctrine¹¹. These predominantly regulate relations between *sovereign states*. However, and increasingly so, IL also regulates relations between *members* of different sovereign states (individuals, organisations and corporations), and between these states and members of other states. Judicially, IL is constituted of *international* courts and tribunals (e.g. the International Court of Justice (ICJ), the ICC, the International Criminal Tribunal for the former Yugoslavia (ICTY)), *regional* courts and tribunals (e.g. the European Court of Human Rights (ECHR), the European Court of Justice (ECJ), the Inter-American Court of Human Rights

¹⁰ Some historians have added the case of Holland and the Low Countries to this list. However, it has not been explored here, for reasons of practical constraints and lack of historiographical material in comparison to the other cases. Crucially, though, a preliminary analysis estimated this case would not contradict the general argument on the need to elaborate new concepts of juridical expansion and accumulation. If anything, by adding to the empirical data on specificity, it confirms the importance of the present thesis. However, a deeper analysis of the Dutch case should be explored to strengthen or nuance the claims made here. See Brenner (2001) for a PM analysis of this case in relation to other European transitions to capitalism.

¹¹ See article 38(1) of the Statute of the International Court of Justice.

(IACHR), the WTO) and increasingly due to judicial globalisation, IL is also constructed and sanctioned by *domestic* courts and tribunals. Moreover, IL is broken down into specific legal fields and sub-fields: International Criminal Law, Law of the Sea, International Environmental Law, International Economic Law, European Law, etc.

Faced with this composite definition and the explosion of international legislation and cases since the mid-20th century, it follows that 'IL' has become more of a shorthand for the ensemble of international (legal) relations than a distinct set of rules and practices. The distinction between private IL and public IL, however, remains applicable and still serves to separate the practice of international lawyers. Most simply, private IL is concerned with the international legal relations between individuals or private parties, whereas public IL is concerned with those between sovereign states. Nevertheless, the distinction between public and private inevitably fluctuates according to political and economic shifts in the international system. Moreover, judicial globalisation contributes to blurring the boundaries between public and private IL (Cutler, Haufler & Porter, 1999; Cutler, 2003), by invoking the increased role of a variety of institutions and domestic courts, as well as the development of International Economic Law and subfields generally associated with private IL (International Trade Law, International Business Regulation, International Intellectual Property Law, etc.). Specifically, in relation to the case developed here, extraterritoriality is conventionally seen as operating 'at the intersection of public and private international law' (Maier, 1982; see also Putnam, 2009).

However, this study focuses on the relationship between extraterritoriality and public IL. If this practice developed primarily, from the mid-20th century onwards, in the domains of International Economic Law and in cases of private IL, it now also affects legislation and cases in a variety of domains and more and more in the public sphere. Moreover, as discussed, there is a general lack of consideration of the political implications of judicial globalisation and extraterritoriality. As the SOPA and PIPA acts show, the problem of extraterritoriality has gone beyond the legal technicalities of assessing the applicable jurisdiction. If the 'public' is defined as state sovereignty, and if the opening of jurisdictional borders challenges state sovereignty, it follows that public IL is the domain that is most structurally challenged by the current global liberal order.

Moving back towards the era surrounding the case studies, stretching from the 16th to the 19th centuries, a large array of legal practices, codes, orders, and theories are referred to. Each historical chapter will be given the task to relocate and explain the multiplicity of these legal relations and institutions. To do so, a methodology based on four angles of analysis will be explored in chapter two, derived from the need for a non-structuralist historical materialist framework. This methodology builds on and develops existing PM

analyses. Before getting into this detail, however, it will be helpful to give the reader a sense of the primary *actors, orders and strategies* constituting the history of extraterritoriality¹².

First, regarding actors, existing historiography recounts more or less uncontroversially their multiplicity and overlapping roles during the high Middle Ages (e.g. Berman, 1983). However, the following period, of interest here, is more problematic, mainly due to the introduction of the state as a growing institution taking over legal duties and legal authority from contending lords, monarchs, popes and emperors.

Dating and determining the causes of the modern transformations of the state has been a highly contentious exercise across the disciplines of the social sciences. Before, but also during the major shift from personal sovereignty to territorial sovereignty, legal, political and economic dimensions of authority were intertwined and variously combined as strategies of accumulation over populations and contending rulers. Consequently, the multiplicity of forms of ownership and jurisdictions during the late medieval and early modern era is reflected in the multiplicity of actors, political and legal institutions, and legal strategies of expansion.

A crucial shift occurs when states, delimited by the territorial property of a sovereign, become political entities that can exist independently of the life of the sovereign. The state's consequent ability to enact and enforce laws thus becomes a *sine qua non* of its legitimate abstract existence. The life of the law replaces the life of the sovereign. If this study follows the argument according to which personal forms of sovereignty during the Westphalian era remained more determinant for European geopolitics than abstract territoriality (Teschke, 2003), the problem of state formation will be open to enquiry in each historical analysis¹³.

If the differentiated formation of early modern states, in particular Spain, France and England, constitutes a central element of this study, this does not preclude the importance of other international legal actors in the development of legal strategies of expansion. In fact, each historical chapter argues for the reassessment of the role of such actors in the formation of the state's legal institutions, inside and outside its sovereign domains. These actors include Spanish theologians, *conquistadores* and ecclesiastics, French *seigneurs*,

¹² This analytical triptych (actors, orders and strategies) is the simplest way to understand the mechanisms observed. However, after further consideration, it appears insufficient for the present argument on the complex trajectories of extraterritorial processes. Moreover, as the thesis will come to show in chapter five, this triptych can be read as a product of the modern system of sovereign states and, specifically, of the English expansion of the capitalist model of territorial sovereignty. It is therefore an example of how the early modern history of public IL has been neglected and overly simplified to fit a neat narrative of the evolution of modern territorial sovereignty. Notwithstanding, and at this early stage of the discussion, this triptych helps the reader to get a sense of the major shifts and concepts this thesis engages with.

¹³ The history of public IL hereby developed does not assume the emergence of an abstract modern state but serves to explore the interdependent relationship between states and IL, and the various actors and orders they refer to.

Philosophes, mercantilists and colonists, and English-British imperialists, lawyers and political theorists¹⁴.

Secondly, on the parameter of international legal orders, modern historians accept the division of the early modern period into three successive frameworks of inter-societal rules and customs, most rigorously laid out by Grewe (2000). If the following chapters refute and resituate some of the causal and sociological links between these orders, it is important to present the reader here with these conventional assumptions. These consist of *ius gentium*, *ius inter gentes*, and *ius publicum europaeum*¹⁵. The mid to late 19th century period then marks the beginning of modern 'International Law' *per se*.

The late medieval *ius gentium* (15th and 16th centuries) referred mostly to the right of natural partnership and communication. It implied the notion of a 'universal' realm (*res publica christiana*), where Christians could enjoy and be accountable to the same rights and duties¹⁶.

The shift to *ius inter gentes* (16th and 17th centuries) marks the turn to more independent state-like entities, and implies the emergence of concerted agreements and treaties 'between' nations as to the laws of war, trade and communication. *Ius inter gentes* develops more subjective rights for international actors, the concept of *rayas* (divisions of the world), and the concept of *terra nullius*, i.e. vacant space crucial to early modern colonisations and their doctrinal justifications.

Finally, the *ius publicum europaeum* (17th and 18th centuries) is also referred to as the *Droit Public de l'Europe* (DPE). It consists in a more technically, professionally and spatially demarcated framework for European relations. Experts are trained to write territorial treaties, the demand for which significantly augments, and scholars become employed to analyse the rights that such treaties and overseas expansion create: notably, the development of *terra nullius* as the right to use non-occupied and/or non-cultivated land, the right to punish those transgressing the law of nature, dynastic rights of succession, and amity lines (replacing the *rayas* of the previous era).

In parallel to these longer-term shifts, the early modern period was comprised of overlapping international legal orders and sources, such as merchant law (*lex mercatoria*), maritime law, natural law (*ius naturalis*), *ius communis*¹⁷, canon law, Roman civil law and feudal law. Because of the parcellised and multi-jurisdictional nature of early modern

¹⁴ This list is far from exhaustive of the variety of international legal actors during the period studied, but shows the main protagonists necessary to understand its major shifts.

¹⁵ The use of Latin classifications refers to the revival of Roman legal concepts during the Middle Ages, but they significantly differ from their Roman counterparts.

¹⁶ The expression *ius gentium* is better translated by the French '*droit des gens*' (law of peoples) than by the expression 'law of nations' usually found in English. However, *droit des gens* is used for later 17th to 18th century practices, though mainly by French scholars (Morin, 2010; Belissa, 1998).

¹⁷ *Ius communis* refers to 'common' written laws known by all scholars and based on the neo-Roman law of medieval universities.

sovereignty (Anderson, 1974), these orders and codes overlap and contest the notion of law and politics as separable domains.

Finally, to understand existing narratives of the history of public IL, the concept of *strategies* used by *actors* for or against new and existing *orders* needs to be explained. These strategies are essential to this thesis, since their deconstruction will enable a broader historical sociology of extraterritoriality that avoids the structural misconceptions of existing mainstream and critical accounts. In contrast to these, however, legal strategies of expansion will be historicised according to social property relations, i.e. the ensemble of social struggles and debates over claims to ownership and legitimate accumulation. They constitute the means through which the two previous sets of concepts and institutions are constructed, and from which actors can derive rules of legitimacy.

Thereby, early modern forms of governance, through which new class interests challenge old ones, are the result of strategies through which ruling classes maintained a hold over contending classes. For example, early modern dynastic classes relied on specific legal strategies to maintain their proprietary status over an increasingly complex society (e.g. collaboration with regional elites, office venality, legislative absolutism). In addition, dominant actors developed legal strategies concerning new territorial acquisitions and dealings between Christians and with non-Christians (e.g. treaties, papal bulls and donations, colonial settlements, professional diplomacy, concepts of *terra nullius*, and of course, extraterritoriality).

These strategies of legal expansion had a direct effect on the definition of sovereignty, which in turn shaped the emergence of international legal orders. The concept of sovereignty should be understood firstly as a post-medieval evolution of concepts of ownership, i.e. *occupatio* or *dominium*. These concepts were contrasted to the concept of *imperium*, and their meanings changed according to the previously set out orders. The concept of ownership, and later that of sovereignty, were the central object of struggles over property relations.

Hence, as the following case studies demonstrate, international legal orders, embodied by institutions and theories of sovereignty, were shaped by legal strategies of expansion. Moreover, these strategies were determined by *social struggles* and *intellectual debates* over concepts of property. This formula constitutes the basis for the historicisation and reconceptualisation of the politics of extraterritoriality as accumulation and struggle.

In the case of Spain, this results in showing how the 16th to 17th century legal order, *ius inter gentes*, was determined by doctrines and strategies of 'jurisdictional accumulation'. Led by the Castilian Crown and Habsburg dynasty, theologians, *conquistadores* and colonisers, these processes are distinguished from late medieval Capitulations (extraterritorial treaties mostly based on reciprocity) as well as from other processes of

geopolitical accumulation. In the case of France and the 17th to 18th century DPE (or *ius publicum europaeum*), the research finds that a different set of international actors (European dynastic monarchs, mercantilists, North American settlers), but also a more legally entrenched set of French actors (lords, philosophers, judges or *Parlementaires*) also engaged in strategies of jurisdictional accumulation. These led to different patterns of European and overseas struggles, and to the formation of a public-private set of legal mechanisms (treaties, diplomacy, inter-dynastic rules of reproduction) that played a crucial role in the development of public IL, albeit one that clashed rather than naturally evolved with, the (international) legal order developing in England. This brings us to the final case, 19th century Britain. Here the international order is explained by legal strategies of expansion that were first developed in the 16th and 17th centuries, during England's transition to capitalism. These can be associated with strategies of primitive accumulation, such as the system of enclosures. Hence, 19th century extraterritoriality is argued to arise out of this particular process of territorial and jurisdictional expansion, which evolved through its confrontation with contending European (i.e. continental) forms of jurisdictional accumulation. Here the struggles between landowners, liberal philosophers and politicians, imperial administrators and colonisers provide invaluable material to showcase the neglected political dimensions of the history of extraterritoriality.

Finally, this research has important implications for building a critique of Neoliberal approaches to IR/IL, notably by proposing an alternative narrative of the emergence of judicial globalisation. Specifically, if 19th century and contemporary processes and principles of extraterritoriality share more commonalities than expected in terms of their relationship to the British expansion of capitalism and of the common law system, the role of extraterritoriality in shaping judicial globalisation carries forward this legacy. This implies an inherent tendency to defend certain interests and ideological assumptions over and above alternative conceptions of property, in the West but also outside the West, where pressure to assimilate and join the club of global liberal states and their 'new world order' increases, often with catastrophic military consequences¹⁸.

In other words, the politics of extraterritoriality and judicial globalisation should be understood more carefully as a complex set of social processes and conflicting interests, determined by strategies of accumulation and the constant interplay of jurisdictional struggles, rather than inevitable and socially progressive phenomena.

¹⁸ The examples of the wars in Afghanistan (2001) and Irak (2003) are obvious cases. Although legal and political assimilation constituted an important part of the arguments for war, whether in terms of humanitarian intervention or nation-building, the reality of attempts to reproduce Western legal and political institutions, so as to cement the 'successes' of military invasion, is sobering. The latest increases of 'green on blue' attacks, i.e. Afghan police forces killing NATO soldiers, occurring on a daily basis, is but one manifestation of the failures and illusions of liberal expansionism (Rubin, 2012)

Chapter Plan

The first chapter reviews the analytical and historical literature surrounding the concepts of judicial globalisation and extraterritoriality. Specifically, it analyses a group of Neoliberal Institutional scholar (Slaughter, Raustiala, Putnam) who figure at the forefront of the IR/IL research program and its narrative of the global judicial order. It then interrogates the historiography of IL, from mainstream (English School, Realist) and critical approaches (Critical Legal Studies (CLS), Post-colonial, Constructivist), as bases to historicise extraterritoriality.

The central question that emerges from these analyses is how extraterritoriality can be defined outside the Neoliberal Institutional discourse, but also how it can be dissociated from imperialism as a strategy of political expansion. In order to substantially develop critical accounts and contribute to the problem of the transhistorical function of extraterritoriality, the chapter situates this study in between two objectives: on the one hand, criticising its contemporary evolution as an inevitable side effect of globalisation, and on the other, avoiding analyses tying extraterritoriality too exclusively to imperialist interests. Thus, the chapter proposes an early modern historicisation of extraterritorial practices, theoretically differentiated by the more generic concept of juridical expansion and empirically contextualised by Europe's transitions to capitalism. It concludes that a historical materialist approach is best suited for this endeavour, and needs to be further discussed as a methodological framework.

The second chapter introduces Marxist theories of IL, and discusses their potential for a historical sociology of public IL. Miéville's commodity form theory of IL is presented as central interlocutor. However, based on external similarities of early modern sovereign states, this historical method is challenged by recent historiography. The latter reveals commodity form theory's lack of differentiation between variable and internally-driven early modern Spanish and French state formations and colonial settlements. Against the commodity form theory of law, this thesis adopts PM as a specificity-driven method. This implies reinterpreting IL as a site of social struggles and contradictions. This reinterpretation of IL contests a Marxist conception of IL as a unified and external form of capitalist relations. The research thereafter undertaken shows that, *contra* assumptions in the commodity form theory, 17th and 18th century international legal relations cannot be generalised or homogenised as 'external similarities' according to political and economic imperatives, i.e. overseas trade or mercantilism. By extension, opening the field to this variety of instances has theoretical implications for understanding IL today as praxis. Specifically, the chapter takes on a recent PM claim on the dimension of 'law as argumentative practice', and from

this attempt at understanding legal agency, proposes the concept of jurisdictional accumulation.

The third chapter develops the first case study, focused on 16th and 17th century Spain, or more exactly the international legal order dominated by the 'Castilian commonwealth'. This commonwealth was comprised of the Iberian kingdoms, a very large part of Central Europe from the Low Countries to Italian states, acquired through the alliance with the Habsburg Empire, and a vast overseas empire resulting in the colonisation of the American continent. The chapter questions existing analyses of Castilian influence on the construction of modern IL. Whether through the doctrine of natural rights developed by the neo-Scholastic school of Salamanca, or the model of conquests and state formation, historiography has missed the importance of exploring the specific social property relations and debates behind these two grand founding narratives. In response, the chapter analyses these social property relations and the debates they provoked as processes and doctrines of jurisdictional accumulation.

In other words, the Spanish international legal order, or *ius inter gentes*, is constituted of strategies of territorial expansion that provide grounds for actors to claim legitimate jurisdiction. Importantly, these strategies, led by Castilian monarchs and their cohort of jurists, *conquistadores* and ecclesiastics, exploited territory and peoples without fundamentally transforming the relations of production that maintained the reproduction of their own class bases. If these strategies sought to reinvent and reconstruct Native American societies according to Spanish property relations, they in contrast failed to provide Spanish society with the developmental resources required for a full transition out of feudalism or their 'infirm' absolutism. Therefore, this chapter establishes some important differences between strategies of geopolitical accumulation and jurisdictional accumulation, but also between these and other types of juridical expansion such as late medieval forms of extraterritoriality (Capitulations).

In continuation of this claim, the fourth chapter moves to the case of 17th and 18th century France. The argument is that the French era consisted of personal relations between European dynastic monarchs who fought, through different strategies (military and jurisdictional) to assert their relative position as uncontested European rulers. Diplomacy became an aristocratic and military matter, favouring a comparative treaty-based method to doctrinal and theological argumentations. Moreover, the French age played an ideologically hegemonic role through diplomacy and the image of absolutism. Secondly, on the domestic front, French Enlightenment philosophers and debates on the *droit des gens* contested this specific publicisation of private politics. The narrative of the DPE only superficially helped the French monarchy. In fact, French rulers had to maintain the image of an oppressive and authoritatively centralising force on diverse socio-political struggles, notably involving the

corporate orders of the legal profession. Finally, on the overseas front, French actors (royal representatives, mercantilists, trading companies) engaged in varied processes of jurisdictional accumulation, ranging from the reproduction of *Ancien Régime* institutions to collaborations with local rulers. However, as in the Spanish case, this hegemony was sustained without leading to economically transformative relations of production necessary to a transition to capitalism.

French influence on the construction of the next grand concept of international legal order, *ius publicum europaeum* or DPE, is thus also contested through a distinction between strategies of geopolitical accumulation and jurisdictional accumulation. Moreover, this chapter takes issue with a crucial argument at the basis of Neoliberal Institutional accounts of extraterritoriality. It asserts that legal strategies of expansion during this era, usually associated with 'Westphalian sovereignty', in fact constitute strategies of jurisdictional accumulation. The research breaks down the assumed continuity between contemporary extraterritoriality and early modern forms of IL. As a result, the inherent 'logic' or 'function' of contemporary extraterritoriality is misguided and cannot be explained through this lineage.

Finally, chapter five contrasts with the previous two by finding similarities between 19th century extraterritoriality and earlier processes of juridical expansion. Specifically, it shows that British legal imperialism had to contend with its European counterparts by innovating over the latter's expertise in strategies of jurisdictional accumulation. Indeed, it did so by adopting the institutional and doctrinal developments proposed by European international lawyers, at the expense of the more practical and indivisible requirements of the common law. Crucially, though, Britain innovated in its colonies by replicating *socially transformative* early modern legal strategies of expansion, such as the system of enclosures developed by landowners and based on the concept of land improvement. In contrast to the socially stagnating effect of continental strategies, Britain provided, through the more informal and 'soft' process of extraterritoriality, a way for British interests and local elites to evolve into the modern sovereign states system. Through the institutions of the common law, they fully engaged in the process of capitalist transition for which the British model of state sovereignty was most suited.

Hence, from early modern processes of primitive accumulation, which helped shape the English state and the transition to capitalism, to 19th century strategies of capitalist accumulation, Britain secured a different trajectory in the history of juridical expansion. These strategies defined the 'managerial', 'middle-ground' logic or function of 19th century extraterritoriality that Raustiala (2009) mistakenly ascribes to a legacy of Westphalia. English centralised state formation and capitalist property relations, where legal actors could afford, politically, to be arbiters to the 'Crown in Parliament', provides a much more plausible model for extraterritoriality to develop as a regulatory 'interface' (Putnam, 2009). However, the

English model also alerts us, through the example of enclosures, to the socially transformative consequences of redrawing the spatial limits of jurisdiction, and to the interests that lie behind such attempts. In effect, this chapter forces us to probe assumptions of 'good management' and naturally progressive judicial liberalism. Therefore, the social struggles and the interests that drive such concepts and their practices should always remain a central object of enquiry.

CHAPTER 1 – JUDICIAL GLOBALISATION, EXTRATERRITORIALITY AND SOVEREIGNTY: A CONTEMPORARY DEBATE

Significant voices in the contemporary field of IL have made a series of claims proposing a convergence of the fields of IR and IL. This convergence can be captured by the phenomenon of judicial globalisation. Neoliberal Institutional¹⁹ scholars, notably Anne-Marie Slaughter (1993) and Kal Raustiala (2009), suggest that liberal governance and economic globalisation have led to a transnational regulatory convergence of legal, political and economic practices. This results in an expanding liberal order of ‘government networks’ sharpening the ‘disaggregation of sovereignty’. Central to these processes are the practices associated with the concept of ‘extraterritoriality’.

Extraterritoriality²⁰ refers to action taken by states and their judiciaries to regulate activity that would not otherwise fall under their jurisdiction. Most analyses concur on emphasising its spread in both various domains of legal activity, and geographically (IBA Task Force Report, 2009). Extraterritoriality has been a long-standing practice and source of international conflict involving U.S. antitrust laws. Developing judicially particularly from the mid-20th century (Gibney, 1996; Baetge, 2007), the trend was confirmed by legislation in the 1990s (Lowe, 1997). However, extraterritoriality has also increasingly characterised judicial and legislative developments in other domains of both international public and private law, such as IL of human rights (Skogly & Gibney, 2010a; 2010b), international criminal law (Hasson, 2002; Bassiouni, 2008) and international environmental law (Zerk, 2010: 176-205). The diversity of actors involved in these processes is also increasing: governments, civil servants, domestic judiciaries, private firms, individuals and NGOs. In short, extraterritoriality’s systemic impact on international relations and IL is being increasingly acknowledged and attracting scholarly attention.

This scholarly attention has been dominated by Neoliberal Institutionalism, a paradigm shift in the field of IL designed to go beyond classical legal positivism and legal realism. Simultaneously, it also articulates a theoretical challenge to classical Realist and Liberal approaches in IR.

¹⁹ There is not a set consensus on the terminology here; Slaughter uses insights from Liberal theory extracted from Moravcsik (1992; 1997) and Doyle (1983), but also from Institutionalism developed by Keohane (1997; for the original argument, see Keohane & Nye, 1989). The term ‘neoliberal institutionalism’ is thus used to convey the mix of these influences. For an example of this collaboration, see Keohane, Moravcsik, & Slaughter (2006).

²⁰ Note that the term ‘extraterritoriality’ is interchangeably used in the literature, though it appears more often in early 20th century scholarship. Also, there exists a subtle difference between extraterritoriality and ‘prescriptive’ or ‘legislative jurisdiction’. Whereas legislative jurisdiction represents the “authority of a nation-state to prescribe or regulate conduct” (Parrish, 2008: 1462), and is dissociated from ‘adjudicative or judicial jurisdiction’ (in which case it refers to the *court’s* power), extraterritoriality is the extended application of both those jurisdictions. In other words, extraterritoriality applies to both legislative and judicial activity (for a different distinction between prescriptive jurisdiction and enforcement jurisdiction, see Shaw (2008: 646)).

Causally, Neoliberal Institutionalists suggest that judicial globalisation and extraterritoriality are both cause and consequence of a wider macro-process of economic globalisation, theoretically externalised as a given 'environment'. In response, judicial globalisation is to regulate a run-away process that tends to escape the normal remit of sovereign jurisdictions. Agency is thus diffused due to the multiplicity of political and private actors involved, emanating more from a series of technical resolutions to practical problems, rather than from intentional policy-making.

Normatively, judicial globalisation is held to represent the natural extension of the liberal rule of law to the global level, thereby facilitating and enticing the development of IL from the model of liberal domestic institutions. In conjunction with the prior claim, this equates to moving beyond traditional international institutions to incorporate the development of transnational and transgovernmental²¹ relations. Philosophically, Neoliberal Institutionalism inscribes itself as the latest addition to the standard liberal narrative of progress, peace and prosperity, though it refuses to explicitly ground its analysis in philosophical terms.

Politically, Neoliberal Institutionalism adopts a conception of power based on the furtherance of liberal values through judicial globalisation. In this conception, judicialisation between G8 countries is favoured over other legal processes and legal regimes, pointing to a more independent global judiciary. This view implies that the source of power and the conditions for judicial dialogue are based on a qualitative or 'effects test' assessment of political entities, rather than on a formal sovereign territoriality principle.

Historically, Neoliberal Institutionalists contend that judicial globalisation emerged, roughly speaking, during the 1980s and primarily in international OECD/G8 state relations, pointing to a series of landmark legal cases that gradually confirmed the so-called 'Effects Test Doctrine'²². Judicial globalisation accelerated and intensified from the 1990s onwards - this time more in the context of legal debates around the demise of 'sovereign territoriality'. Centrally for the problem of this thesis, Neoliberal Institutionalists generally avoid the question of degree to which this new legal practice presents a resumption and reinterpretation of its 19th century legal precedent. This previous extraterritoriality was legally

²¹ 'Transgovernmental networks' is an expression used by Slaughter (2004) to emphasise the growing interaction between officials of different governments beyond the formal channels provided by international institutions, and triggered by the increase in private economic exchanges and their necessary regulation.

²² The Effects Test doctrine is also known as the 'objective territoriality principle' (Born & Rutledge, 2007: 573), where in a disputed case to determine jurisdiction, the substantial effects on a territory are applied rather than the territorial identity of the disputants. The Effects Test doctrine has developed slowly since the beginning of the 20th century, notably with the *Lotus* case in IL (*The SS Lotus (France v. Turkey)* P.C.I.J., Ser. A, No. 10, 1927) and the *Alcoa* case in U.S. courts (*United States v. Aluminium Co. of America (ALCOA)* 148 F.2d 416 (2d Cir. 1945)), and has since been expanded by U.S. legislation (see *Restatement (Second) Foreign Relations Law of the United States*, 1965 and *Restatement (Third) Foreign Relations Law of the United States*, 1987). However, from the perspective of a British international lawyer, see Shaw (2008: 688) who expresses a different distinction between the objective territoriality principle and the effects doctrine: in the former, part of the offence takes place within the jurisdiction.

defined and explicitly encoded as a form of sovereignty in the emergence of public IL and in the context of European imperialism.

On all four counts – the causal, normative, political and historical – Neoliberal Institutionalism is deeply problematic. Causally, it legitimises conceptual ambiguity over the cause and effects of extraterritoriality, which depoliticises the practice and disaggregates the agency of extraterritorial actors from its social origins and impact. This leads to adopting a set vocabulary that limits the possibility of thinking and acting on extraterritoriality outside the bounds of mainstream academia and policy.

Normatively, its naturalisation and universalisation of the liberal rule of law fails to consider what Martti Koskeniemi referred to in the context of pre-World War One liberal legalism as the ‘dark side of liberal internationalism’ (2001). This recounts how the specifically value-neutral legal vocabulary hides the flattening of normative differences, encased in culturally specific national jurisdiction. Neoliberal Institutionalism also obscures the normative implication of liberal world ordering, as contending voices and concerns are rendered passive and mute in spite of conflicts and protestations, within the G8 countries and *a fortiori* with non-G8 countries. Finally, to this day, Neoliberal Institutionalists have not investigated whether the promises of progress, peace and prosperity have actually prevailed and materialised.

Politically, the move away from the presumption of territoriality has opened a debate over the democratic nature of judicial globalisation, and more specifically on the relationship between sovereign institutions and judicial extraterritoriality. However, these debates on the rise and fall of territoriality fail to fully address, socially and geographically, the strategic political dimensions of judicial globalisation and extraterritoriality.

Historically, the hesitations of neoliberal institutionalist thinkers to engage in a full-blown empirical comparison between contemporary practices of extraterritoriality and their legal precedents rule out any serious and deeper investigation of the standard nexus between socio-political processes of imperialism and legal world-ordering.

Given these shortfalls, this thesis suggests that an approach to the transformations in the relations between IL and IR requires a much wider theoretical remit, which covers the previous four dimensions. In particular, it suggests that the contemporary debate in IR/IL has to take the historicity and political character of the evolution of IL much more seriously. To do so, this thesis proposes an alternative theoretical formulation that addresses the *social history* of IL: in effect, a history of legal strategies of expansion.

To this end, the first and second sections present and question the mainstream literature on extraterritoriality, focusing on the dominant influence of Neoliberal Institutionalism. Extraterritoriality is conceived as occurring at the ‘interface’ of public, private, domestic and international forces coalescing towards judicial globalisation. For causal,

methodological and political reasons, this analysis conceptually narrows more than explains the current breadth of developments in extraterritorial practices.

The third section turns to the history underlining the Neoliberal Institutional framework as a first step towards building a theoretically and sociologically broader understanding of extraterritoriality. Raustiala's attempt at comparing its 19th and 20th century phases remains strongly indebted to the English School of IR. Accordingly, although a product of the imperial project, extraterritoriality is seen here as laying the foundations for the progressive development of universal IL, and thereafter evolved independently from imperialism.

However, Post-colonialism, Constructivism and CLS²³ contest this claim, as the fourth section will explore. They focus on extraterritoriality as a strategy of legal imperialism, i.e. as a means to affirm the political superiority of imperialist or hegemonic actors. Though rich and enlightening as comparatives to present practices, these studies remain theoretically undeveloped.

Looking for ways to elaborate the previous body of work, the fifth section will explore existing histories of pre-19th century IL. However, in spite of their empirical richness, these studies remain limited from a lack of incorporation of the varieties of extraterritoriality as a transhistorical ordering process.

Thus, the sixth and final section proposes a social history and alternative conceptualisation of extraterritoriality that goes beyond English School, Constructivist, CLS, Post-colonial and Realist historiographies of IL. On the one hand, the section proposes to explain the various instances of extraterritoriality according to historical materialist categories so as to offset the reductive definitions of 'interface' and 'management of differences'. This entails restricting the term of extraterritoriality to a contingent practice of a broader ensemble of legal strategies of territorial expansion, i.e. juridical expansion. On the other hand, this conceptualisation must be read through a dialectical materialist history that depicts the relationships between processes of juridical expansion and imperialism as strategies of accumulation.

Neoliberal Institutionalism and the New Rise

²³ CLS originated in North America in the nineteen seventies from the influence of the Frankfurt School and in search of an alternative to traditional Marxist theory. As a critique of liberalism and of the conservative and conformist system of legal practice and education, it identifies legal processes with language and discourse. David Kennedy and Martti Koskenniemi spearheaded its application to IL. "Rather than a stable domain which *relates* in some complicated way to society or political economy or class structure, law is simply the practice and argument about the relationship between something posited as law and something posited as society." (Kennedy, 1996 [1988]: 236). For the latter, legal practice, served rather than inspired by legal theory, consists mainly of "setting up mechanisms for peaceful settlement, allocating competences (jurisdictions) and organizing cooperations through diplomatic contacts and multilateral organizations" (Koskenniemi, 1992: xv). This he terms 'contemporary pragmatism'.

If empirical and specialised work on the domestic causes and effects of extraterritoriality abound²⁴, the demand remains for more systemic studies of the process as a transnational phenomenon (Parrish, 2009: 819; Putnam 2009: 470). Two exceptions, Raustiala (2006; 2009) and Putnam (2009), can be associated with Neoliberal Institutionalism, a trend spearheaded by Slaughter's work on 'judicial globalisation' and 'IR/IL'.

Extraterritoriality is a practice by which "courts and other domestic-level institutions claim direct authority over entire transactions, including those elements outside the territorial boundaries of the regulating state." (Putnam, 2009: 459-60). Extraterritoriality has *quantitatively* developed in the late 20th century, in the U.S. but also in other advanced capitalist economies, from the realm of Commercial Law (antitrust, securities, labour regulation) to those of Criminal, Environmental and Human Rights Law.

A second important development, particularly emphasised by Neoliberal Institutionalists, is a *qualitative* one. "U.S. extraterritoriality is often equated with unilateral exercises of 'economic statecraft'" (Putnam, 2009: 461), referring to, for example, the 1996 Helms-Burton Act (Cuban Liberty and Democratic Solidarity Act) and other provisions of sanctions taken against Nicaragua, Libya and Iran (D'Amato Act for the latter two) (Lowe, 1997). However, these 'extraordinary' (*ad hoc* and unilateral) measures should be differentiated from the more recent move towards regulatory and administrative cases outlining general rules of application (such as the SOPA and PIPA acts).

A third crucial development is that of the *Effects Test doctrine*: "the effects test permits a U.S. court to exercise prescriptive jurisdiction...when an activity has direct or substantial effects within the United States." (Parrish, 2008: 1457-8). The Effects Test doctrine has widely opened the scope of application of extraterritorial jurisdiction. Other states have started to apply the doctrine, notwithstanding a period of vociferous protesting²⁵. Generally, this signifies a move away from a 'formal' definition and application of state sovereignty to a functional consideration of the effects of actors and behaviour (Raustiala, 2009: 235). In less neoliberal terminology, the Effects Test refers to personal and subject-matter jurisdictions. From these three developments, extraterritoriality has spilled over into the domains of public IL and national security policy.

A general consensus posits that globalisation is the main cause for these developments. Defined primarily as the increased opening and crossing of borders by private

²⁴ See Parrish (2009) for a comprehensive survey of publications.

²⁵ For example, Communist and some developing states resisted the move away from the principle of full sovereign independence, thus rejecting the restrictive theory of sovereign immunity (Born & Rutledge, 2007: 223). Moreover European states also protested, diplomatically and legally, against U.S. extraterritoriality (*ibid*: 569). However, "a number of European states have begun to apply selected national regulatory statutes extraterritorially, with rigor approaching that of the United States, arousing complaints from both the United States and international businesses." (*ibid*).

and public actors, it produces ever more instances of transnational legalisation: accordingly, extraterritoriality is generally accepted 'as an inevitable – and either a desirable or innocuous – byproduct of globalization' (Parrish, 2009: 820). Conscious of the analytical paucity of this general consensus, Raustiala (2006; 2009) specifies the causal role of globalisation by focusing on 'post-war globalisation'. In this he includes the rise of the regulatory state, post-1945 interdependence and intra-industry trade, the decline of classical legal thought, the Democratic Peace theory, and U.S. hegemony (2009: 95).

In a similar attempt to specify the causes of extraterritorial jurisdiction, Putnam's analysis of U.S. extraterritoriality reverses the correlation to globalisation. Instead, "judicial assertions of extraterritorial jurisdiction actively project U.S. rules and policy preferences into the transnational realm." (Putnam, 2009: 463). If located "at the interface of domestic law and international relations" (481), the rise of extraterritoriality needs to be further emphasised as one that is *shaping* globalisation:

"Order in the transnational realm, however, also has sources in the strategic behavior of states and private entities. *To the extent that domestic courts are able to enforce domestic laws against transnational actors with physical, financial, or citizenship ties to their respective state territories, those laws feed into the formation and operation of transnational regulatory structure.*" (Putnam, 2009: 482; added emphasis)

Furthermore:

"The size of the U.S. economy and its high (in absolute terms) level of *integration* into global markets, however, give its courts *unparalleled enforcement power* across numerous issues." (483; added emphasis)

Thus, Putnam focuses more on domestic causes by tying the impetus behind the rise of extraterritoriality to domestic courts and to their defence of national sovereignty through regulation and public policy. However, she also maintains that the reason for the success of this domestic strategy lies in the reach and penetration of the U.S. economy. She refers to the current U.S.-led order as the 'transnational regulatory structure', i.e. the economic and political leverage of the U.S. on other states and private international actors. In this analysis, if extraterritoriality is explained by the drive of domestic courts, this drive in turn occurs either in reaction to the threat of the 'deterritorialising' consequences of globalisation or as a byproduct of the global regulatory regime expanding the U.S. model. She thus applies in a somewhat backhanded manner the Neoliberal Institutional framework of international causes as a background to her otherwise thorough domestic analysis.

The notion of ‘interface’ Putnam uses is also present in studies on global administrative law, as extraterritoriality is thought to operate as a nodal point between ‘bottom-up’ and ‘top-down’ institutional forces (Kingsbury, Krisch & Stewart, 2005: 21-53). Other instantiations of this conceptualization are found in Slaughter & Zaring (1997: 28)²⁶ and in Raustiala: “Whether focused on policing, projecting, or protecting, extraterritoriality provides a kind of *middle ground* between these two extremes [i.e. imperialism and international agreements]” (2009: 7, added emphasis). Specifically, extraterritoriality is understood as a strategy to manage the legal differences inherent to the Westphalian system of states.

In sum, the first point to challenge is the claim that extraterritoriality occurs at the interface between domestic and international, public and private categories of legal activity, acting as a mechanical instrument of institutionalisation. The second point is its relationship to globalisation, where even according to the above authors, the analysis rests on thin ice. If the process of globalisation has been a popular theme in recent IR and IL literature, the juridical aspects of globalisation remain understudied, specifically in legal scholarship (Raustiala, 2006: 219). At the same time, IR theorists have been ignoring the growth of legalisation, particularly that of judicial extraterritoriality (Putnam, 2009: 469-70). The remainder will consider how the IR/IL interdisciplinary agenda answers these concerns.

‘IR/IL’ and ‘judicial globalization’

If extraterritoriality is a difficult practice to define juridically²⁷, another set of difficulties appears when making sense of the theoretical approaches to the problem, notably as these incorporate theoretical schools in IR and IL. Before distinguishing Neoliberal Institutionalism’s answer from inside the IR/IL agenda, it is helpful to situate the latter in a broader theoretical context.

For Parrish, two major theoretical positions now divide Anglo-American IL scholars: ‘Sovereigntists’ and ‘Internationalists’ (2009: 815-819). For ‘Sovereigntists’ (e.g. Goldsmith & Posner, 2005), state sovereignty remains the only guarantor of individual rights and liberties. ‘Internationalists’, on the other hand, (e.g. Slaughter and Raustiala) believe in the

²⁶ “Continuing conflict over the limits of extraterritorial jurisdiction can be a *catalyst* for the definition and redefinition of legitimate national interests in a globalized world” (Slaughter & Zaring, 1997: 28, added emphasis).

²⁷ Gibney (1996), Parrish (2008), and Born & Rutledge (2007) argue that extraterritoriality is characterised by unsystematic, confused and convoluted legislation and judicial decisions.

emancipatory and progressive potential of international legal institutions, promoting individual interests with and above the state.

This distinction, though schematically helpful, hides a more complex doctrinal map, which will be briefly historically charted in relation to our case. During the first half of the 20th century, the U.S. judiciary had gradually moved toward the extraterritorial application of antitrust regulations. Consequently, and to justify theoretically the move away from the condition of territoriality, 'legal realism' developed as an attack on classical legal positivism, for which the source of IL resides in state consent delimited by territorial boundaries²⁸.

Legal positivists limit their focus to interpreting and applying the law, rather than accounting for its social context or morality. They retain from the broader positivist tradition the assumed ability of the scientific observer to assess the empirical world without the burden of value or ethical judgement, thereby emphasising the *a posteriori* condition of morals (Hart, 1958). Thus, legal positivism deems consent and rationality between legal equals as authoritative and in this sense defines IL as "a set of objectively determinable rules devoid of moral content and applicable to states solely on the basis of their consent" (Ago, 1984 *in* Byers, 2008: 613).

The legal realist challenge to classical legal positivism was undertaken by the 'New Haven School' or 'policy-oriented jurisprudence' represented by Harold Lasswell and Myres McDougal (McDougal & Lasswell, 1996 [1959]: 113-143). This school defines law as an "ongoing process of authoritative and controlling decision", a "human artifact, established, maintained and changed by the decisions of the politically relevant actors" (Wiessner & Willard, 1999: 319). It contrasts legal positivism's determined account of the will of the state with a more pragmatic policy-oriented jurisprudence, emphasising the desire to understand law in the international realm as particularly flexible and adaptive. Normatively, this led to the discussion of specific and pre-determined values, which makes possible a rapprochement with liberal ideals, albeit in the specific way IR theorists developed these in the 1980s.

Indeed, legal realism can be read as a precursor of neorealist and neoliberal approaches in IR theory. Since decision-making actors and policy increasingly transgressed national boundaries, focusing on them meant the demise of territoriality as the pre-condition to the definition of sovereign jurisdiction. Not that this phenomenon was particularly new, but its doctrinal, legislative and judicial acknowledgement certainly seemed to represent a paradigm shift after the cautionary post-First World War principles of sovereign territorial independence. However, it would be a mistake to read this history as the fall of legal positivism. Legal realism's influence was more exactly one of developing different strands to international legal positivism. Thus, if legal realism influenced current 'Internationalists'

²⁸ Though long established prior to this case, the territoriality principle was made explicit by *American Banana Co. v. United Fruit Co.* 213 U.S. 347 (1909).

through their move away from territoriality and their opening up to international or systemic explanations, their critiques are more specifically directed at *classical* legal positivism and its strict, voluntarist conception of sovereignty. In other words, 'Internationalists' can be considered to have developed a 'consensual' form of legal positivism (Çali, 2010: 76-77), as a balance between classical legal positivism and legal realism.

For one, this explains the continuing dominance of legal positivism as a general paradigm in Anglo-American legal social science, as remarked by Kayaoglu (2010: 220) for example. Secondly, 'Sovereignists' and 'Internationalists' share common methodological ground in terms of maintaining a general conception of legality and social research based on quantifiable, deductive and empiricist analysis. This is founded on 19th century concepts of the state and individual (the causal and historical dimensions). Nevertheless, debates are indeed taking place, showing disagreements between their analyses of international relations and domestic legal institutions²⁹ (the political and normative dimensions). From these broader clarifications, Neoliberal Institutionalism can now be specified as arising out of the IR/IL research program.

Developed in the last twenty years in Anglo-American scholarship, IR/IL is a way to bridge the disciplines of International Relations and IL, in theory³⁰ and in practice³¹. Its proponents claim that through the process of globalisation, common ground has reformed between two disciplines that ultimately share the same goals of international peace and cooperation. Though open in principle to the broad spectrum of IR theories, the bulk of IR/IL protagonists adopt the premises of IR theorists from neorealist, neoliberal and institutionalist perspectives (e.g. Krasner, 1983; Doyle, 1983; Keohane & Nye, 1989)³². While Doyle assesses the correlation between the proliferation of liberal states and the absence of armed conflict occurring between them, Krasner and Keohane & Nye respectively developed the concepts of regimes and complex interdependence to mark the rise of institutions and their

²⁹ See for example Helfer & Slaughter (2005) as the response to Posner & Yoo (2005). The issue of domestic courts as independent actors or forms of government is an important debate between sovereignists and internationalists. The question is whether state sovereignty should limit the independence of domestic courts to state borders or whether their jurisdictional limits or identity is contingent on regional conditions and the world order. This debate is central to the future development of judicial globalisation, and will most certainly divide it.

³⁰ See, Abbott, 1989; Slaughter, 1993, 1995; Beck, 1996; Slaughter, Tulumello & Wood, 1998; Ratner & Slaughter, 1999; Slaughter & Burke-White, 2006. For general reviews of the growing interdisciplinarity, see Beck, Arend & Vander Lugt, 1996; Barker, 2000; Byers, 2000; Benvenisti & Hirsch, 2004; Hathaway & Koh, 2005; Simmons & Steinberg, 2006; Nollkaemper & Nijman, 2007; Armstrong, Farrel & Lambert, 2007.

³¹ IR/IL is concerned with shaping policy on, *inter alia*, national security strategy (Slaughter *et al.* 2008), military interventions (Slaughter, 2011), and the principle of the Responsibility To Protect as 'Duty To Prevent' (Feinstein & Slaughter, 2004). Moreover, Anne-Marie Slaughter held the position of Director of Policy Planning in the U.S. State Department from January 2009 to February 2011. This position consisted in taking "a longer term, strategic view of global trends and frame recommendations for the Secretary of State to advance U.S. interests and American values" (U.S. Department of State Website, 2010)

³² Neoliberal Institutionalism can be associated to what Simpson (2001) defines as 'anti-pluralist', or the 'liberalism of certainty', referring to liberals who see the nature and character of the state as determining its rights in the international sphere. It is contrasted with the classical, 1945 'Charter' version that focuses on the ideals and forms of IL as guaranteeing the independence of sovereign statehood. Slaughter, along with Thomas Franck, John Rawls, Fernando Tesón and Michael Reisman constitute the latest versions of this form of liberalism (Simpson, 2001: 539).

impact on rule- and decision-making. IL scholars (e.g. Abbott, 1989; Slaughter, 1993) embraced and enriched these theories with analyses of recent changes in the institutional framework and content of international norms³³.

Slaughter (2004) argues that the post-Cold war era has moved from a pluralist and horizontal international society of states to a global order of transnational vertical networks cemented by a growing commitment to liberal norms, institutions and values. Peace, liberal democracy, market economies, transnational networks, transgovernmental communications, and finally, the collapse of the foreign/domestic distinction are attributes of the contemporary world that justify the need for both disciplines to regroup. Global liberal governance is the 'new world order' (Slaughter, 2004) in which the growth of transnational 'legalization' (Abbott *et al.* 2006) is reshaping the institutional forms of law and politics, domestically and internationally. In practice, these changes can (and, they argue, should) be assimilated to those attempted on a smaller scale in the EU (Slaughter & Burke-White, 2006).

Slaughter's project to overcome the distinction between domestic law and IL consists in accounting for the 'disaggregation' of the state. This does not imply the disappearance of the state but its readjustment to an international system composed of government networks and institutions that replicate the infrastructure and bureaucracies of liberal governments (i.e. with legislative, executive and administrative functions). These networks take many overlapping forms: vertical and horizontal, bilateral, plurilateral, regional and global. Their role is to disseminate information, and help enforcement and harmonization (2004: 12-15). Strengthening domestic institutions, backstopping domestic governments (i.e. acting as emergency safeguards) and compelling actions by national governments are three ways in which a global legal system can help the failure of both traditional IL and unitary states' responses towards transnational threats³⁴ (Slaughter & Burke-White, 2006).

While processes of economic liberalism have long been eroding the state's grasp on trade, finance and property by encouraging informal and private negotiations, Slaughter argues that the legal profession (domestic, transnational and international) is, and should be following the same track. Originally described as 'transjudicial communication' (Slaughter, 1994), this phenomenon has developed into 'judicial globalization' (Slaughter, 2000; 2005)³⁵. This refers to the increasing citing and referencing of foreign laws in domestic courts and also to the institutionalised encounters between foreign judges, a phenomenon notably

³³ See Simmons & Steinberg (2006) for a collection of such studies over the last decade.

³⁴ "Terrorists, arms dealers, money launderers, drug dealers, traffickers in women and children, and the modern pirates of intellectual property" (Slaughter, 2004: 1); "weapons of mass destruction and looming environmental disasters of global magnitude" (2004: 4).

³⁵ See Baudenbacher (2003) for a review of a symposium on judicial globalisation held in 2002, and attended by judges and advocate-generals sitting in international courts. In this, Alvarez exposes five 'half-truths' about judicial globalisation, which amount to cautiously acknowledging this growing phenomenon, albeit in a less ideologically grounded manner than scholars such as Slaughter, for example, whose work he criticises more strongly in a previous paper (Alvarez, 2001).

developed by conferences³⁶ and the standardisation or Americanisation of professional training (e.g. in Japan, see Hashimoto, 2008). Generally, if the U.S. has eagerly exported its legal system, importing foreign laws has been much more controversial, sparking opposition from the judiciary, executive, academy and legislature, even in the form of a congressional bill (Flaherty, 2006: 478). For this author, such opposition contrasts with the rest of the world, where transjudicialism is practised with much less controversy³⁷. The reason Flaherty provides is ‘a potent mix of American exceptionalism and democratic theory’, concerned with the issue of democratic accountability or ‘democratic deficit’ (*ibid*). In his view, if the current trend is certainly towards more ‘judicial borrowing’, even by the U.S. from foreign sources, it still requires better argumentation as to its benefits and democratic ‘service’. This echoes earlier points on the general confusion and indecision by judges and the executive regarding extraterritoriality. In contrast, judicial globalisation is also being contested from a more critical academic standpoint, concerned with the consequences of international hegemony on non-compliant states rather than with domestic ‘democratic’ interests (Toufayan, 2010; McLean, 2004; Buxbaum, 2004). These interventions remain very scarce though. In short, the concept of judicial globalisation is largely open to debate and analysis, thus questioning its grounding role in the Neoliberal Institutional analysis of extraterritoriality.

To conclude here, the important question is whether Neoliberal Institutionalism, through the concept of judicial globalisation, can account for the qualitative, quantitative and doctrinal transformations surrounding extraterritoriality. The following will argue that it cannot, since a gap has grown between the concept and practice of extraterritoriality.

The Exclusion of the Politics of Extraterritoriality

To recap, extraterritoriality is understood as a crucial mechanism of transnational institutionalism and contributes to strengthening the independence and interdependence of a global legal profession. The normative internationalist argument behind the defence of extraterritoriality is the idea that it harmonizes the rule of law and defends its principles against states that take advantage of the sovereign states system, but also against rogue networks and global environmental threats. As such, it contributes to the sanctioning, by Western domestic courts, of the expansion of the global liberal order. From the correlation

³⁶ See for example the conferences organised by The International Organization for Judicial Training (IOJT): “As of August 2012, the IOJT has 106 member-institutes from 65 countries” (IOJT website home page, 2012). Their fifth international conference was held in Bordeaux in 2011, and the sixth conference will be held in Washington, D.C. in November 2013.

³⁷ “Leading national courts in this regard cut across all imaginable lines: India, Canada, Zimbabwe, Hong Kong, South Korea, and Botswana all borrow from legal sources outside their borders. Some states, notably South Africa, constitutionally require reference to international and comparative law for domestic interpretation. Last and not least, other states frequently cite the case law of the U.S. Supreme Court, including, among others, the Irish Supreme Court and the U.K. House of Lords.” (Flaherty, 2006: 477).

between judicial globalisation and economic globalisation, a symbiosis produces new forms of political accountability. These new forms confirm the move away from territoriality as a guiding principle for determining jurisdiction. In Slaughter & Zaring's words, "tidy circles demarcating national jurisdiction, even based on an expanded conception of territoriality, become either impossible or meaningless." (1997: 1)

However, why is territorial sovereignty dismissed for an alternative re-division and re-layering of legal institutions and networks into topical sections of legal, political and economic activity (commercial, environmental, human rights, etc.)? By creating new forms of international legal cooperation and power assertion beyond the classical liberal and realist dilemma (or sovereigntist/internationalist debate), extraterritoriality is said to provide societies with a middle-ground strategy as solution to the threats of the new world order.

This section questions this prognostic and the framework of analysis on which it is based. Certainly, developments in extraterritoriality need to take the debate over its definition and causes outside strict legal analysis to incorporate IR theory. But Neoliberal Institutionalism only goes so far. The following argues that it fails on three counts: causally, methodologically, and politically. If correct, the analysis of extraterritoriality as an interface strategy, at the core of judicial globalisation and leading to new forms of transnational democracy, is theoretically limited and ideologically driven. This critique consequently calls for a turn to history, so as to reconstitute the grounds for a sounder analysis of the processes at hand.

1. Causally, the preceding analyses argued that economic globalisation, extraterritoriality and judicial globalisation are mutually explanatory. As an analogy, Rosenberg (2000) has shown that globalisation theories are pervaded by the problem of the use of globalisation as *explanans* and *explanandum* (i.e. as a concept that is simultaneously cause and outcome). In our case, economic globalisation explains extraterritoriality, which in turn explains judicial globalisation. This is problematic because Neoliberal Institutionalism relies on this explanatory void to justify a normative claim: that the symbiotic relationship between law and politics, essential to liberal democracies, can be transferred from the domestic to the transnational level and that this transfer is necessary to control the inevitable changes of globalisation. That these global changes can be controlled by the liberal rule of law is based on the assumption that they are external to liberal democracies but also to international theory. In other words, although these changes are independent of us, we are still the only ones capable of understanding and resolving them, so the story goes. But not only are these problems external, they are also nebulously attributed to globalisation, as *explanans* and *explanandum*. This mystical conception of globalisation thus denies a more serious exploration of the origins or causes of global problems by assuming a separation

between judicial liberalisation and the occurrence of transnational crimes, conflict and inequality.

Neoliberal Institutionalism thus presents two contradictory pictures: one where processes and concepts are interdependent and mutually explanatory, i.e. the global level, and one where theory and practice, law and politics, are separately and hierarchically organised, i.e. the domestic level. It then collates these two inconsistent pictures, to produce a story according to which the global and domestic levels are converging and merging into a *transgovernmental liberal order of networks*, or the 'new world order'. One consequence of these analytical contradictions is to obscure how such stories become constitutive of the problems they attempted to solve³⁸. They naturalise or objectify processes or events as inevitable, ahistorical and socially neutral phenomena that can be quantified and compared according to mathematical formulae. The concepts of globalisation and interface³⁹ are symptomatic of this objectification. The latter refers to a sociological 'no-man's-land', implying the notion of change and transition albeit emptied of any social analysis. Its use discursively legitimises the lack of historical or sociological inquiry, and absolves the author from arguing why this should be the case.

2. Methodologically, this problematic conceptual framework is justified by a distancing from classical legal positivism and classical liberalism. This results in a *rapprochement* between neorealist and neoliberal theories at the heart of the argument for IR/IL convergence, but one that remains in the positivist tradition, albeit as a 'consensual' derivation. In effect, this produces empiricist analyses of political and legal practices through the prism of state policy and interests. This is shown, for example, in Putnam's tables and model calculations, entitled 'Probability that U.S. federal court exercises extraterritorial jurisdiction over a novel claim' (2009: 478). The consequence of this treatment of politics and international relations, following Jahn's critique of Moravcsik's liberal internationalism, is that it 'denies the ideological nature of the political realm' (Jahn, 2009: 432). Because of its linear conception of history but also from its understanding of method in social science, "positivism is left with only two choices: either it simply does not study the necessarily particular phenomena of the political sphere, or it presents such particular knowledge as general" (*ibid.* 433). Putnam runs into this problem when trying to explain why in sixteen percent of the cases in one model, the court decides not to exercise jurisdiction, thereby not acting as the variables predicted it would.

³⁸ As Cox (1986) seminally wrote, "theory is always for someone and for some purpose", thereby questioning the methodology of problem-solving theories that he identifies with neoliberal and neorealist IR approaches. This applies to IR/IL, as it defines its 'method' as the action of linking practical legal problems to a relevant theory of IR, i.e. as applied theory or a bridge between abstract ideas and concrete practice (Ratner & Slaughter, 1999).

³⁹ The etymology of the word 'interface' is pertinent. Its use as a noun is recent and dates to the 1880s. Its widespread use, notably as a verb, developed in the 1960s following the rise of computer jargon. It thus has a poor pedigree as an analytical concept (Online Etymology Dictionary, 2011)

“One explanation for this gap involves measurement error, or ‘noise’ in the data. A more intriguing possibility is that other factors of a more political character systematically negate exercises of jurisdiction in circumstances where we would otherwise expect them. Testing specific hypotheses about the conditions under which judges use discretionary doctrines – for example, international comity, *forum non conveniens*, stays on proceedings – to avoid particular claims where jurisdiction is supportable is, therefore, a needed step in elaborating a *more fully specified theory* of U.S. regulatory behavior in the transnational realm.” (2009: 481, added emphasis)

In short, if Putnam acknowledges the possibility of political (or ideological) shortcomings in her calculations, her answer is to continue elaborating presentations of ‘particular knowledge as general’ so as to be able to account for judges’ ‘discretionary doctrines’. This hides the belief that through this scientific process of gradual elimination and specification, the truth of political behaviour will become more and more distilled and free of ideology or ‘discretion’. “What makes ideological knowledge ideological is, therefore, not its particularity – which it shares with all forms of political thought – but rather the fact that it hides this particularity.” (Jahn, 2009: 435). The point here is that Neoliberal Institutionalism cannot avoid the arbitrary and contested nature of international relations, and the fact that it attempts to do so reveals its tendency to “systematically express and explain the world view fitting a dominant liberal power whose interest and need lies in the ‘administration’ of the world rather than in political struggle.” (*ibid*: 434).

3. Finally, following from the previous conclusions, Neoliberal Institutionalism has two crucial political implications. Firstly, it assigns a specific administrative role to extraterritoriality that ignores the social relations and political struggles involved in the emergence of extraterritorial disputes. Arising from the methodological issue previously addressed, this problem is also inherent in the formal and procedural character of the legal system (Koskeniemi, 2005). Moreover, it is exacerbated by the Effects Test doctrine. The point here is that Neoliberal Institutionalism does not sufficiently question this lack of social and political consideration.

Secondly, it cannot account for alternative, emerging or potential conceptions and practices of extraterritoriality that defy or do not comply with the administrative requirements of the global liberal order. In other words, Neoliberal Institutionalism narrowly defines extraterritoriality as an administrative strategy to manage the differences between dominant liberal states. As Slaughter & Zaring conclude:

“we have argued that states would do well to refrain from using extraterritorial jurisdiction as a foreign policy tool, however tempting it may be. The task here is to distinguish unilateral foreign policy objectives, which should generally not be pursued through judicial means, from cooperative

or coordinated transnational legal solutions to global problems, enforced through national courts.” (1997: 28).

This argument exemplifies their attachment to a ‘consensual’ form of legal positivism and a Weberian concept of the state retaining its primary monopoly on violence and territory. Extraterritoriality is thus restricted to certain domains sanctioned by a ‘general trust’ and a ‘sense of community’ (*ibid*). The question is, of course, who has the power to define these concepts.

Problematically, such a conception ignores the diversity of debates on jurisdiction and democratic representation. Specifically, it sidelines debates occurring today that do not ‘trust’ the global liberal order and who develop notions of extraterritoriality according to a different ‘sense of community’ and legal order. For example, the ‘Occupy Movement’ invokes in a particular and radical way extraterritorial jurisdiction, by attempts to use and re-appropriate space inside and across national boundaries. It annuls the legality that operates within the space because it challenges the bases of the social contract originally justifying that legality (e.g. Fenton & Couldry, 2012). Moreover, it has attempted to do this through national courts (e.g. Huus, 2011; Hiscocks, 2012⁴⁰). However, it does not start from the premise of national sovereignty nor wishes to extend or harmonize existing regulation; instead, it wants to provide a fresh ground (spatial and conceptual) on which to reformulate the relations between individuals and institutions. The Neoliberal Institutional framework excludes and delegitimises these debates, by closing off the possibility of theoretically explaining or judicially examining the growing demands of a large and varied segment of the population of Western democracies. These demands are expressed in ‘extraterritorial’, ‘re-territorial’ and ‘de-territorial’⁴¹ practices, politicised against the ruling classes’ financial and executive hold on the state.

Finally, a more obvious political implication is the exclusionary effect of judicial globalisation and extraterritoriality on states that do not take part in the ‘global judicial conversation’, raising issues of liberal hegemony or neo-imperialism. However, the discussion will have to set aside this larger dimension for now. Since the issue here was to highlight the limits of Neoliberal Institutionalism, it follows that if even in and amongst the ‘global judicial club’ political and legal dissent is categorically denied any assimilation to judicial extraterritoriality, it follows that such dissent is even more limited when raised by claimants outside that club.

Thus, paradoxically, if Neoliberal Institutionalism tries to account for the transitory and transformative role of extraterritoriality, through the concepts of interface and globalisation, it

⁴⁰ Mandy Hiscocks was jailed for sixteen months in Canada for her ‘participation in organizing the protests against the G20 leaders summit in Toronto in the summer of 2010’ (Hiscocks, 2012).

⁴¹ See, for example, the Deterritorial Support Group Website (2012).

instead presents a sociologically bland, depoliticised and exclusionary liberal ideology. If Raustiala's (2009) attempt to historicise extraterritoriality is noteworthy, is it sufficient to broaden and enrich the above analyses? The following argues that it remains flawed due to its reliance on the English School's account of the rise of international society.

The English School and the Contingency of Imperialism

'A shift in form but not in function'

Generally, extraterritoriality is traced back to the development of merchant law in the 10th century. It was carried throughout the Middle Ages in treaties and capitulations, notably with the Ottoman Empire and mostly for purposes of trade. Its aim was to protect merchants and subjects living abroad from local jurisdictions, and its evolution was closely tied to that of consular jurisdiction and immunities (Numelin, 1950). During the 19th century, however, extraterritoriality developed alongside modern IL as an administrative tool for the state to divide sovereignty and protect (mainly British) subjects abroad. It thereby helped to institutionalise the territorial and administrative bases of Western states, empires and modern IL. It is conventionally accepted that the practice declined at the start of the 20th century, in parallel to the decline of European imperialism (Liu, 1925; Johnston, 1973). Though some historical literature on this earlier practice exists (see for example the debate between Spagnolo, 1991 and Pennell, 2010), Raustiala's contribution, arising out of the Neoliberal Institutional literature, is unique in terms of integrating this history to the analysis of contemporary practices.

Raustiala refers to the role of Westphalian sovereign territoriality as a framework in which the function of extraterritoriality remains fixed⁴². He defines this function as a strategy to manage, e.g. to minimize or capitalize on, differences between sovereign states (somewhere in between imperialism and cooperation). Therefore, the changing forms of extraterritoriality are nevertheless 'cohesive' (2009: 224) to the Westphalian evolution of the international system, since they are contingent externalities of its primary function.

In effect, he analyses how 19th century extraterritoriality differs from its late 20th century return. Crucially, the differentiation between form and function leads him to claim that the 'old' extraterritoriality died with the imperialism that supported it, under the hatchet of U.S. President Roosevelt. However, rather than contrasting this with "a purer form of strict territoriality", the U.S. "reinvented and recast extraterritoriality for a new era." (2009: 95).

⁴² He also develops the concept of 'interterritoriality' specifically for the evolution of colonisation and federalism in the constitution of the U.S.

Specifically, he argues that extraterritoriality today is more unilateral⁴³, affects 'coequal sovereigns' and 'not merely weak semisovereign powers' (2009: 95). In addition, it is more directly linked to the development of international institutions and to the informal harmonization of rules. Thus, he comes to this important conclusion:

"Postwar American hegemony, in short, was manifested not only in military power and economic influence, but also in an expansive understanding of the reach of domestic law – an understanding that honored American anti-imperialism while it simultaneously extended American legal rules throughout the globe." (Raustiala, 2009: 96)

In other words, Raustiala uses the theoretical distinction between the form and function of extraterritoriality to argue that there is a difference between imperialism and the hegemonic extension of rules 'throughout the globe'. This analysis provokes many questions, and is contested by critical historiography. Before looking at why, it will help to situate Raustiala's claims in their historiographical tradition, namely the English School.

The Road to Universal Liberal Peace

The English School⁴⁴ in IR is defined by its Grotian legalistic influence and *via media* position between Liberal and Realist IR theory (Little, 2000). This makes it logically attractive to international lawyers. Moreover, the horizontal Westphalian order invoked by the IR/IL literature corresponds to the English school's analysis of the European society of states in the 19th century, based on the institutions of the balance of power, diplomacy, IL, war and the Great Powers. According to Bull & Watson (1984), this society expanded and became an *international* society through the diffusion of those institutions and the 'acceptance' of the standard of civilisation, all this in the context of emerging 19th century positivism and academic specialisation. In short, for this narrative the relationship between legal institutions and the international theory upholding them is paramount to the development of a progressive system of equal states. This relationship will thus be briefly sketched.

IL became a profession in the late 19th century, notably with the creation of the 'International Law Association' and '*l'Institut de Droit International*' in the 1870s (Neff, 2006:

⁴³ This is meant in the sense that it is less used as a multilateral means to cooperate and compromise, as it was between the Great Powers over the spoils of colonisation, such as the Scramble for Africa that occurred during the Berlin Conference (1884-85).

⁴⁴ Martin Wight, Hedley Bull and Adam Watson are considered the fathers of the school. In contemporary theory, the school is more or less associated with constructivism through the work of Tim Dunne, David Armstrong and Andrew Linklater, for example.

40). IR gradually followed as a discipline in its own right in the early 20th century⁴⁵. However, both disciplines were still very interlinked. Emerging IR scholars were generally trained as lawyers, and IL constituted the most tangible and direct manifestation of thinking about how to remedy the diversity and clash of political entities. In their early days as professions, the interconnection between IR and IL was grounded in the progressive promises of an international rule of law leading to experiments in international institutional design, consisting in a series of congresses, conferences and conventions during the 19th century. The initial rise of mostly private and non-political arrangements set standards for the Postal Union, telegraph, and railway services, thereby interlocking the development of rules with the expansion of (European) international society. Consequently, dominant positivist theories, seeing “laws as commands issuing from a sovereign person or body” (Shaw, 2008: 29), had to transfer this reasoning to the international scene “and immediately came face to face with the reality of a lack of supreme authority” (*ibid*). This move left IL scholars with the enduring problem of the sources of international legal obligation: how could IL, as the common will of sovereign states, be binding and superior to the will of individual states? The failure to resolve this issue weakened the positivists and strengthened the claims of the early liberal internationalists, as it implied thinking “the essence of law as beyond juridical description” (Shaw, 2008: 30).

The elation of this liberal wave culminated and ended in 1919 with Woodrow Wilson’s League of Nations, blamed for failing to avoid the Second World War. This brought a renewed impetus to positivist conservative principles after 1945, albeit framed in more sociological and scientific terms than that of the late Publicists or even Kelsen’s 1920s pure monism. Scientific Realism on the one hand with Hans Morgenthau (1967) and, on the other, H. L. A. Hart’s legal positivism (1958) strived to keep each discipline at bay, arguing that international politics operate according to rules of their own. IL should not have a determining moral influence on their establishment and development. Rather, IL and IR theory are the *a posteriori* manifestation of state consent and diplomatic practices.

Today, Neoliberal Institutionalism challenges this claim. This brief history serves as background to the IR/IL critique of classical legal positivism. This critique places international theory on a par with international developments, and inscribes the rise of modern IL in a continuum where legal positivists and liberal internationalists simultaneously shaped and adapted to institutional changes. This led to a universal system of IL, which through the gradual wisdom of theory, left behind the violence of imperialism. Again, this narrative strives to explain changes in international orders without confronting all the social parameters such

⁴⁵ British scholars from the University of Aberystwyth awarded the first Chair in International Politics in 1919, but universities in London, Geneva and Chicago quickly followed during the 1920s. See Sylvest (2005) for a detailed account.

a question requires. It therefore provides a truncated view of the 19th century, one which allows Raustiala to posit that the function of extraterritoriality, that is the management of differences, is the core transhistorical aspect of such legal practices, while their imperialist and coercive aspects are merely a historical form, independent of legal actors or legal institutions. This externalising of imperialism in the history of IL has been contested by a wave of studies in the last decade from different theoretical approaches, namely CLS, Post-colonial, and Constructivist theories, to which we will now turn⁴⁶.

Critical Histories

Revisiting ‘the legal conscience of the civilized world’

A growing number of histories of IL focus on imperialism and colonisation as constitutive of European expansion and modern sovereignty. These studies critique the English school, *inter alia*, for presenting colonisation and imperialism as negative externalities of the ordering process necessary to the internationalisation of European society (Thomson, 1994; Anghie, 1999; 2005⁴⁷; Koskeniemi, 2001; Keene, 2002; Simpson, 2004; Krisch, 2005; Benton, 2002; 2010). In short, they depict the ‘dark side of liberal internationalism’.

Specifically, Koskeniemi analyses the role of 1870s liberal internationalists in the rise of IL as a profession and in the spread of European society. This analysis helps to see the discursive similarities between 19th century and 21st century conceptions of extraterritoriality, as a means to secure the expansion of liberal order. It thus questions Raustiala’s distinction. The ‘1873 men’ (mainly Rolin, Bluntchli and Westlake) were influenced by a combination of the German historicist and communitarian movement and French ethical and universal positivism. They provided an original formulation of the methodologically pluralist conception of liberalism and IL, later advocated by IR/IL. Moreover, they defended a vision of an international legal society based on the individual as a bearer of right, rather than on the institutions that provide those rights: “the consent of the international society... is the consent of the men who are the ultimate members of that society.” (Westlake *in* Koskeniemi, 2001: 52). This view emphasised the role of jurists in enunciating this consent, based on a blurring of the ‘distinction between the internal and international’. For Bluntschli, “its objective is a human world order” (*ibid*: 53). They also shared current liberals’

⁴⁶ Marxist theories of IL have also been developed in reaction to the conventional history of imperialism. These will be discussed in the following chapter.

⁴⁷ Anghie’s work is the result of scholarship in the 1960s and 1970s with Third World scholars such as R. P. Anand or Judge T. O. Elias. One Western and notable example is C. H. Alexandrowicz (1967) (Chimni, 2008: 500). More radical and Marxist scholars such as Chimni also recognize themselves under the acronym of TWAIL, ‘Third World Approaches to International Law’.

concepts of free trade, interdependence, human rights and individual freedom, law as an outgrowth of society, and the policy-oriented tasks of jurisprudence (*ibid*: 54). Their failures, for Koskenniemi, could also be applied to Neoliberal Institutionalism. For one, they ignored the evidence of social and economic inequalities as counter-arguments to progress (as anomaly rather than condition); furthermore, they ignored the discrepancy between legal elites and peoples, along with the issue of non-European civilisations.

The late 19th century historico-philosophical conception of law used arguments from positivism, naturalism and rationalism as these were conceived across Europe (Koskenniemi, 2001: 11-97). IL, as an organic and progressive phenomenon, was founded by the conscience and consciousness of the European society of states, 'the legal conscience of the civilized world'. Indeed, the 1873 men turned "inwards to look for a law that they believed existed in their moral conscience, cultivated by a humanitarian sensibility whose outward expression was their alignment with the political liberalism of the day" (*ibid*: 53). Crucially, they worked in reaction to the older rationalist tradition of the Publicists, for whom IL emanated from the will and independence of the state, and which ran into the 'Austinian challenge' that denies the potential of IL to transcend the paradoxical identity of its source and subject, the problem of the source of international legal obligation. In this sense, this liberal moment is the first serious theoretical contribution to converge the realms of international politics and law as an answer to the growing tensions between societies and their clashing conceptions of the world.

Can this comparison be extended to extraterritoriality? The 1873 men, as advocates of individual rights, favoured the non-extradition of political offences (Koskenniemi, 2001: 50). However, faced with an increasing number of political dissidents ('members of the Commune, nihilists or socialists'), Bluntschli changed his position. "In 1879 the Institute [*Institut de Droit International*] voted (19-7) to adopt a provision that enabled States to exercise extraterritorial jurisdiction for acts committed anywhere and by anyone, if such acts constituted attacks 'on the social existence of the State' or endangered its security." (*ibid*: 68-9) Moreover, Rolin, Lorimer, Bluntschli, and Martens all agreed, "anarchism and communism were crimes against all States, to be combated by all available means." (*ibid*: 69) Echoing previous arguments on the ideology of Neoliberal Institutionalism, "the Institute's *esprit d'internationalité* was tolerant but paternalistic and repressive." (*ibid*) It thus used extraterritoriality in accordance with its desired view of the world, implying that its permanent function, contrary to Raustiala's argument, is not simply to 'manage difference'. In both cases, old and new, extraterritoriality is conceived as a malleable mechanism to defend or attack individuals according to their position towards the state claiming jurisdiction. In other words, it is not neutral but inherently political. This open conception also played a part in maintaining a loose definition of sovereignty to accommodate the different regimes of

occupation and intervention, before and after the Berlin Conference (1884-5). To the extent that no clear standard was ever formulated, the legal and conceptual ambiguity around concepts of sovereignty and extraterritoriality was essential to their increasing territorial and social implications: “Every concession was a matter of negotiation, every status dependent on agreement, *quid pro quo*. But the existence of a *language of a standard* still gave the appearance of fair treatment and regular administration to what was simply a conjectural policy.” (*ibid*: 135)

In sum, this history shows that the ambiguity and flexibility of liberal and neoliberal conceptions of extraterritoriality cover up ideological positions with, often violent practical implications. In other words, the form and function of extraterritoriality might be distinct, but not in the way discussed by Neoliberal Institutionalism.

Legal Imperialism

More explicitly, Kayaoglu’s work (2010) identifies extraterritoriality as an imperialist strategy applied by Western powers in Japan, the Ottoman Empire/Turkey and China. Indeed, the 19th century is characterised by the formation of non-Western states as inferior actors in relation to the Western standard. This implied the creation of separate spheres of legality and forms of sovereignty (regimes of extraterritoriality) while at the same time excluding existing or ancient non-Western forms of power and configurations of territory, law and individuals. Generally, the historiography of legal imperialism contests the Eurocentrism prevalent in mainstream IR and IL. Instead of simply attributing the ideological impetus of modernisation and legal institutionalisation to Western states and Western actors, it emphasises the role or pressure of non-Western actors and social conditions in shaping Western responses and their interactions. Their arguments focus on the interdependence between Western and non-Western encounters, so that modern sovereignty was not merely imposed, but reshaped through the process of its imposition (Anghie, 2005).

Since Kayaoglu compares British and American legal imperialisms, relating the latter to American legal realism, globalisation and the ‘war on terror’, he suggests, “that legal imperialism is a powerful conceptual tool to examine post-World War II international order” (2010: 196). He corroborates this by looking at the ways in which American foreign policy and the military are creating increased conditions for legalisation⁴⁸ and legal exclusion⁴⁹. So

⁴⁸ Congress enacted the Military Extraterritorial Jurisdiction Act (MEJA) in 2000 for military personnel and contractors.

⁴⁹ This refers to zones of non-law and to the granting, in June 2003, of “civil and criminal immunity to American contractors employed by civilian agencies like the State Department or the Central Intelligence Agency.” (Kayaoglu, 2010: 202) This leads to cases of impunity for acts committed in the prisons of Abu Ghraib and in Baghdad’s Green Zone, for example.

in his view, imperialism is not an externally given form of extraterritoriality, but its inherent condition since modernity.

Pushing this analysis further, if 19th century extraterritoriality (as legal imperialism led by British positivism) laid the foundations for the modern sovereign states system, the crucial innovation that differentiates this equation to earlier occurrences, for Kayaoglu, is the positivist legal episteme. According to this ideational constructivist approach, it follows that naturalism, the preceding legal episteme which was not territorially defined⁵⁰, would suffice to explain why earlier forms of extraterritoriality emerged *ad hoc*, through practices of merchants, missionaries, conquistadores and settlers, rather than through an imperial state.

Was this the case? For one, the early modern Spanish state was heavily involved in forms of legal imperialism and extraterritoriality. Moreover, the concept of land improvement developed by Locke and even earlier *terra nullius* principles in natural law developed practices of an extraterritorial type. This framework is thus not satisfactory. These problems raise two fundamental questions.

First, was extraterritoriality a categorically different process before the 19th century? If so, what process categorically changed it?

Second, what does this tell us about IL as a system of world order and strategies of expansion (e.g. imperialism, hegemony, primitive accumulation), particularly in relation to contemporary developments?

In order to answer these questions, the pre-19th century specificities of the varying relationship between extraterritoriality and imperialism need to be explored.

A Necessary Detour: Early Modern Legal Strategies of Expansion

If the 19th century sees the consecration of the national European state as political standard for the modern period, this claim carries the baggage of three centuries of social struggles and transformations of public and private spaces of legitimate authority. Moreover, this early modern history is dense with debates over the concept of sovereignty and bears the weight of earlier processes of colonisation and juridical expansion. These debates and processes need to be revisited in light of the problem of extraterritoriality.

⁵⁰ I am accepting here for the purposes of the argument that naturalism and positivism are distinct and successive periods in international political thought. However, there are strong arguments against this periodisation, according to which the use of these categories by modern scholars tends to ignore the overlapping and context-specific nature of early modern political thought. See Tuck (1999), Pagden (2003) and Boucher (2010). Moreover, contesting this shift from naturalism to positivism, Koskenniemi (2001: 131) writes: "In the first place, the leading international jurists were not 'positivists' in any clear sense but made constant use of arguments about morality or natural law... In the second place, this gives too much credit to the 'universalism' of earlier jurists such as Grotius or Vattel, or indeed Klüber and von Martens. They used natural law because in the absence of large numbers of treaties, arbitrations, or a profession of commentators there was little else on which they could rely."

After some general points concerning the dilemmas of early modern historiography in IL, the influential narratives of Grewe (2000), Schmitt (2003), and Reus-Smit (1999) will be reviewed. Their main points and limitations will only be introduced, as their specific claims will be dealt with in each case study of the present thesis. Nevertheless, this section will argue that although empirically rich, these analyses do not provide an account that explains *both* state formation and extraterritoriality, and do not integrate the transhistorical and conjunctural aspects of the latter.

Generally, the absence of a global system of equally independent sovereign states has made scholars in both disciplines of IR and IL ignore pre-19th century international legal history (with the exception of Westphalia as the extra-ordinary and premature birth of both systems of modern IL and international relations⁵¹). However, there is no shortage of classical legal and political thinkers during the early modern era, in fact quite the opposite; contemporary scholars thus integrate their work to the dominantly '19th century-centric' narrative. This has resulted in multiple anthologies of classical legal thought rather than historical sociologies of jurisdictional and jurisprudential developments. That is to say, the succession of (mostly) Vitoria, Suárez, Gentili, Grotius, Pufendorf and Vattel, is written in a continuum where each author is linked to his peers in an attempt to find the running thread of progress from primitive to developed, medieval to modern, naturalist to positivist. This creates a classical ontology that results in legitimising modern discipline (Jahn, 2000; 2006)⁵², while also generating problematic debates. For example, Nussbaum (1954: 296) discusses whether Vitoria and the Spanish scholastics should be given more ascendancy than Grotius, and hints at issues in the conventional linear narrative. For Anghie (2005), these irresolvable and in the end unhelpful debates illustrate how conventional histories ignore the structural impact of imperialism. However, the point of the present discussion is also to avoid generalising and reifying 19th century forms of imperialism and extraterritoriality.

Grewe and Schmitt's narratives reach further than 19th century imperialism by emphasising the state-led power-politics that in their view ultimately determine the movement of history. Looking at early modern concepts of the political, they also ideologically question the formation of the liberal state and its legal institutions. Grewe's *The Epochs of*

⁵¹ According to the English school, the European states system was born in 1648 at Westphalia and became an international society through various processes of expansion during the 19th century. This narrative has now been widely contested, but the debates on Westphalia far exceed the scope of this chapter. A classic reference is Krasner (1993). See Beaulac (2004) for a poststructuralist critique of the Westphalian discourse in IL, and Teschke (2003) for a historical materialist critique of the myth of Westphalia in IR. See Asbach & Schröder (2010) and Harding & Lim (1999) for historical and contemporary debates on Westphalia and IL.

⁵² This work argues how the classical canon and specific ideas of man, state of nature and society developed by classics are used to construct the discipline of IR away from political theory and concerned with a separate international realm. See also Bartelson (1995) for an unorthodox genealogy of modern sovereignty.

International Law (2000)⁵³ is based on separate hegemonic or imperial moments to periodise the history of IL. He also analyses shifts from notions of *ius gentium* to *ius inter gentes* and *ius publicum europaeum* to account for the early modern periods, incorporating classical theorists and political developments. However, Grewe sustains a state-centric, power-politics conception of international relations, where IL reflects rather than conditions reality. This is unfolded through a long-haul account of the history of modern IL, from the crystallisation of the Holy Roman Empire and the Papacy during the 9th century, up until the end of the 20th century. In each epoch, IL was fashioned by a distinctive hegemonic power or system of power, viz. Spain, France, Britain and America. Here at least, the birth of the modern international legal order is understood as a longer and more complex historical process. However, since international rules and norms are elaborated and/or transformed under the pressure of national ideologies and prerogatives, IL remains a formal and restricted legal structure translating the vagaries of international politics. Grewe's realism and emphasis on the relationship between power, law and politics can be found in Schmitt's controversial and politically charged interpretation of modernity.

The *Nomos* (Schmitt, 2003) is a critique of the 20th century's new international legal order, which he argues is founded on universalism and spacelessness. 19th century IL is explained by the rise of England as a powerful maritime power that was able to remain external to European territorial disputes. Accordingly, England put liberalism and commercialism at the fore of international relations by concretising the separation of the public and private spheres. What this meant for legal doctrine was a split in the discipline of IL, from which international private law tried to distinguish itself by becoming purely positivistic and nationalistic. For Schmitt, this had disastrous consequences on the legal doctrine, rendering it confused and incapable of dealing with the practical consequences of the separation of public and private spheres; in contrast, absolutism and the 17th to 18th century period of the DPE (which corresponds to Grewe's French age) is eulogized as the golden age of international politics, mainly because of its physically identifiable enemy and clearly defined set of rules, i.e. the bracketing of war.

Reus-Smit (1999) challenges this narrative by making a more pronounced constitutional and institutional disjuncture between post-Westphalian Absolutist Europe and the geographically unspecified Modern society as two separate 'constitutional structures'. Reus-Smit's institutionally constitutive approach to IR focuses on the politics-law divide he

⁵³ Although Nussbaum's piece (1954) is more often quoted in Anglo-American textbooks of IL, it is of significantly less depth and richness than Grewe's. However, the English translation of Grewe (2000) is altering this, making the work gradually more present albeit with the cautions required by its Schmittian influence and apologism of Hitler's Germany (Koskeniemi, 2000; Miéville, 2005: 155; Armstrong, Farrell & Lambert, 2007: 67; Teschke, 2011a; Teschke, 2011b). A less recent but still useful classic of the Anglophone history of IL is Butler & Maccoby (1928).

analyses as a consequence of Absolutist regimes and the revolutionary thought they engendered, calling for the liberalisation, centralisation and depersonalisation of sovereignty:

“In the Age of Absolutism, politics and law were conjoined in the figure of the sovereign, and the metaphysical precepts of divine and natural law, provided theoretical, if not practical, breaks on the abuse of power. The revolutionary rejection of this model of state and political legitimacy demanded new ways of thinking about the relationship between politics and law, resulting in the liberal conception of sovereignty.” (2004: 37)

In contrast to Grewe and Schmitt’s arguments for England’s imperial maritime domination, Reus-Smit emphasises the role of revolutionary ideas in bringing about a ‘new’ conceptualization of the separation between law and politics. For Reus-Smit, ideas are the driving force behind constitutional, and thereby institutional changes. However, his categorisation of Absolutist and Modern societies focuses on the specificities of each structure, and the unsystematic role of ideas in shaping the transition between each, rather than the structural, ‘material’, social processes underlying them. Problematically, his focus on ideas forces a distinction between the ideational and material, or abstract and concrete, which cannot capture the missing analysis of the varieties of extraterritorial practices, sovereignty formation and geopolitical expansion. This problem is reminiscent of those found in Kayaoglu’s analysis (2010). If social reality encompasses the interplay between ideas, institutions, and social conditions of reproduction, international theory must find ways to account for the interdependence between these processes.

Therefore, the final section will propose a historical materialist framework of early modern international legal relations: this consists in a method that seeks “to encompass historical specificity, as well as human agency, while recognizing within it the logic of modes of production” (Wood, 1995: 59). Crucially, this framework will force us to incorporate what has been significantly lacking in analyses of international legal change, i.e. the transition to capitalism and its relationship to imperialism.

A New Route?

To recap, two types of answers can be found to the problem of the relationship between extraterritoriality and international legal orders. The first answer represents mainstream analyses and would argue that extraterritoriality is not necessarily imperialist or

coercive. This implies either restricting its contemporary rise to a collection of individual exceptional cases whose multiplicity can be explained by the greater number of states and domestic legal systems (the classical legal positivist or sovereigntist view), or associating the rise to the positive and democratically sanctioned development of transnational liberal governance (the 'consensual' positivist or internationalist view).

In contrast, a second type of answer would consider the continuing link between legal imperialism and extraterritoriality. Extraterritoriality's new phase confirms that the world order, and specifically its limits, remains a contested space of struggle in which violence and domination are interdependent with legality and legitimacy, albeit phrased in different terms or directed towards different classes and peoples.

Theoretically, these two answers reflect an important distinction. On the one hand, we have either an agential or a structural analysis of, respectively, domestic institutions and globalisation for determining the conditions and limits of extraterritoriality (classical and neoliberal approaches). On the other, more critical side, we find a reversed analysis of extraterritoriality as a 'transhistorical' social process of domination and differentiation between polities (Post-colonial, CLS, Constructivist and historical materialist approaches).

Thus, the major challenge facing a historical materialist approach in our case consists in reconnecting the concepts and practices of extraterritoriality to their social contexts so as to avoid the depoliticised, asociological and ideological implications of Neoliberal Institutionalism. This approach needs to explore the different relationships between extraterritoriality and imperialism so as to construct a conceptually clearer and empirically richer narrative of the different phases of extraterritoriality. Specifically, this narrative needs to be based on social processes rather than structural constructs. This implies distinguishing itself from existing critical approaches by avoiding the reductionist implications of the West vs. non-West dichotomy, and by providing a less determinist and functionalist account of the role of capitalism and imperialism.

Empirically, historical materialism entails focusing, through historical and geographical comparison, on the social relations tying extraterritorial actors (lawyers, government officials, judiciaries, merchants, indigenous populations, settlers, intellectuals) to the particular modes of production or international legal orders in which their identities and interests are reproduced. Such a focus reveals the types of practices extraterritoriality covers as concrete processes (with different roles in the 19th and 21st centuries, but also crucially in the pre-19th century period), but also it reveals how some have ignored these processes so as to construct the history of public IL as a series of reified orders of international relations. Instead, a historical materialist approach to IL constructs a history of public IL as one of *struggle* over contested dynamics of juridical expansion.

Conceptually, historical materialism requires differentiating between different but interdependent categories of social analysis, so as to better grasp the socially contested interplay between ideas and praxis. To this end, this thesis proposes to start with the concept of legal strategies of expansion⁵⁴ as a general category from which extraterritoriality is conceived as a concrete manifestation. This conceptualisation, to contrast with the notions of interface but also of form and function, implies a difference between *extraterritoriality* (practice specific to 19th century capitalist international legal order) and *juridical expansion* (general category or ensemble of processes that includes the former but also applies to both land-appropriation by early modern absolutist, i.e. non-capitalist states, and land improvement by the early modern English state).

This distinction follows from a hypothesis, which answers the first question posed previously: was extraterritoriality a *categorically* different process before the 19th century? The answer is yes, in most cases. The hypothesis, which stems from a historical materialist approach, is that the transition to capitalism shaped a particular type of territorial expansion (or, in Marxist terms, accumulation), which in turn shaped the conditions in which extraterritoriality could be invoked or pursued. This argument is schematic and can only take us a very short way. Its use is in highlighting, *contra* previous analyses, the fundamentally transformative role of capitalist social relations and their effect on international relations and IL. Consequently, it must follow that a primary task is to conceptually mark this shift in the history of extraterritoriality, by using the above distinction.

The second task is to emphasise that this hypothesis implies focusing on the interplay between extraterritorial practices and geopolitically located social relations, whether capitalist or non-capitalist. It must not imply using capitalism as a fixed category from which to deduce international legal practices, thereby reproducing the previous literatures' mistakes by replacing globalisation and imperialism by another explanatory void, capitalism. Instead, if the hypothesis asserts the particularity of capitalist social relations, these are always also continuously contested and expanding. In fact, this is specifically what produces the strong link between them and extraterritorial strategies of accumulation.

In other words, 19th century extraterritoriality is a discursive legal framework for practices of juridical expansion shaped according to negotiated arrangements between the Great Powers. This narrowing, articulated by British administrative and colonial actors, helped to shape positivist IL. Moreover, this thesis will claim that it echoes earlier legal strategies of expansion specific to England's transition to capitalism, namely the system of enclosures (or primitive accumulation). Instead of legal positivism producing extraterritoriality and 19th century sovereignty, *à la* Kayaoglu, struggles over the social conditions or property

⁵⁴ As discussed in the introductory chapter, 'legal strategies of expansion' is a shorthand expression for the ensemble of institutional and discursive legal strategies of territorial and jurisdictional expansion.

relations at the core of capitalist expansion and early modern sovereignty enabled legal positivism, through later processes of extraterritoriality, to take root and determine 19th to 20th century IL.

However, these claims raise important controversies for the Marxist literature on IL. The following chapter needs to contrast the above propositions with contending historical materialist historiographies and theoretical frameworks, specifically the commodity form theory of law. Only then will it be possible to extract a solid research framework for an early modern history of extraterritoriality and geopolitical expansion, by delving into the Spanish, French and British cases as the three major instances of early modern state formation and empires.

Conclusion

This chapter set out to show how the recent developments in extraterritoriality have brought to light their inadequate conceptual and historical treatment by mainstream and critical approaches in IR and IL. Moreover, it found that these legal processes, merging and delimiting domestic and international, public and private domains of jurisdiction, are important signs of political and economic transformations, but crucially, are also determinants of states' strategies of expansion.

The first and second sections argued that Neoliberal Institutional analyses of contemporary extraterritoriality reify a specific conjuncture of legal practices, driven by neoliberal imperatives and determined by a judicial club of leading capitalist states. This framework limits the behaviour and expectations of actors actively and potentially involved in extraterritorial practices. In effect, it depoliticises and de-socialises those practices, drawing an exclusionary picture of the international legal order based on judicial globalisation and liberal governance as non-imperialist and democratic projects.

The third section looked at the historical foundations of this framework, followed by a fourth section highlighting points where its definition of extraterritoriality's function as managing difference between sovereign states was contested by a growing critical historiography. The latter explored the construction of colonial and civilised sovereignty through the formation of late 19th century IL and the role of liberal international lawyers, specifically re-establishing the constitutive relation between extraterritoriality and imperialism. However, it left open the conceptual definition of extraterritoriality as a transhistorical phenomenon, and ignored the heterogeneity of state formation and imperialism.

The fifth section therefore introduced studies of pre-19th century international legal history, before concluding that to build a theoretically broader and empirically richer narrative of extraterritoriality, a different framework was necessary. In order to focus on the social

relations and different modes of production emerging during the early modern period, a historical materialist approach was proposed.

Finally, the sixth section introduced a distinction between historically contingent i.e. capitalist practices of extraterritoriality and a more general category of legal strategies of expansion. This rests on the hypothesis that the social relations determining the transition to capitalism provide a key to explain, through a reconstituted narrative, the limits of contemporary 'neoliberal' extraterritoriality but also the potential of current alternative conceptions of juridical expansion.

In the next chapter, these concepts will be measured theoretically against contending Marxist histories of IL, before being tested empirically, in the following chapters, through the experiences of sovereignty formation and colonial diffusion of early modern Spain, France, and England-Britain.

CHAPTER 2 – A HISTORICAL MATERIALIST THEORETICAL FRAMEWORK

The previous chapter brought to light the political limits of current approaches to the rise of extraterritoriality and to the broader phenomenon of judicial globalisation. In response, it was proposed to revisit the history of extraterritoriality in two ways: empirically, through early modern historiography and the transition to capitalism, and methodologically, through the broader concept of legal strategies of expansion. The task for the present chapter thus consists in laying out how historical materialist approaches to IL could fulfill these requirements. It concludes by developing a concept of juridical expansion based on the differentiation of strategies of 'jurisdictional accumulation' from strategies of extraterritoriality, so as to account for the heterogeneity of these processes, their understudied role in state formation and the construction of international legal orders.

Since the late nineteen nineties, there has been an increasing amount of Marxist scholarship addressed to issues in IL⁵⁵. For an earlier generation of scholars (e.g. Fine *et al.* 1979; Fryer *et al.* 1981; Sugarman, 1983), the task was to address a crude reading of Marx on law that took the base/superstructure distinction as a starting point⁵⁶. They thus acknowledged the lack of theorizing of law in Marx's writings and the consequent danger of 'easy generalization and accompanying avoidance of history' (Corrigan & Sayer, 1981: 22). In response, they developed less functionalist definitions of law influenced by E. P. Thompson's critique of structural Marxists (1978). Aided by the end of the Cold War, scholars started reinterpreting the Soviet legal theorist Evgeny Pashukanis (1978), while becoming more and more critical of the post-nineteen nineties appetite for international justice. Although scholars in the eighties were dismissive of Pashukanis's formalism (e.g. Warrington, 1983; Fryer *et al.* 1981), Miéville's (2005) recent interpretation has resurrected his commodity form theory for the world of critical IL. This has come in parallel to the development of Marxist-inspired 'Third World Approaches to IL' (TWAIL) and their focus on the role of imperialism in constructing legal principles and institutions (e.g. Chimni, 1999).

A historical materialist approach starts from the premise that law needs to be understood as process, not as a thing-in-itself (Marks, 2007: 203), since it is manifested *in* and as social relations that continuously structure the manifold of human relationships. If this claim is in line with a more general move in mainstream legal theory since the New Haven School (McDougall & Lasswell, 1996), historical materialism in addition implies a holistic,

⁵⁵ For example, Marks, 1997; Cutler, 1997; Chimni, 1999; Miéville, 2005; Bowring, 2008; Head, 2008; Knox, 2009; Bachand & Lapointe, 2010. See Marks (2008) for an edited volume on Marxism in IL.

⁵⁶ For example: "The totality of these relations of production constitutes the economic structure of society, the real foundation on which arises a legal and political superstructure and to which correspond definite forms of social consciousness." (Marx, 1971)

structural and ‘totalizing’⁵⁷ conception of law. In effect, IL’s totalizing nature is *a priori* assimilated to the expansion of modern sovereignty and capitalism. Marxist critiques consist in claiming that IL maintains relations of dependence between states and other international legal actors. It does so by providing institutional standards and frameworks for state intervention, diplomacy and trade that enshrine dominant class interests. These power relations hide behind a discourse of progressive and egalitarian principles. This discourse translates into a faith in IL as a means for social justice, and underlies public debates and various ‘humanitarian’ practices. Therefore, Marxists are sceptical of liberal paradigms and the practices of intervention they justify.

However, the way in which this scepticism is converted into the theory and practice of IL is a thorny terrain of debate. In between Gerstenberger’s faith in the role of IL⁵⁸ and Miéville’s often-quoted radical conclusion⁵⁹, Marxists remain divided, if not mystified by what we could call a ‘liberal dilemma’. If Knox (2011) argues that this problem revolves around a lack of engagement with the distinction between strategy and tactics, the following suggests it also suffers from the poorly addressed tension between structure and agency. Of course, Marxist scholarship has gone through different waves of addressing this problem, which in more practical political terms, boils down to the split between reformist and revolutionary socialists. For example, Lukacs (1971) pertinently raises both strategy/tactics and structure/agency problems relating to law and social change⁶⁰. Nevertheless, this problem persists and is accentuated by the sophistication of international legal processes and their growing interdependence with contemporary international relations and their discipline, IR, as exemplified by the influence of Neoliberal Institutionalism and the ‘IR/IL’ research program.

Thus, if this chapter is an attempt to enlighten the problem of the rise of extraterritoriality through a historical materialist critique, and thus challenge the phenomenon of judicial globalisation, it also strives to develop Marxist theories of IL through this

⁵⁷ Marks explains this theoretical need for totality as follows: “Where international law is concerned, the concept of totality highlights the need for a complex kind of analysis that connects international legal norms with the wider processes through which their interpretation is shaped and enabled. It urges us to approach things relationally, rather than in isolation, and to pay attention to the larger social forces that create the conditions in which international legal ideas and concepts emerge, develop and get deployed.” (Marks, 2008: 15)

⁵⁸ “[S]ince bourgeois forms of democracy cannot be organised in a supranational political space – the world is precisely not a global village! – the first stage must be to set limits to powers and the powerful by international law. In this objective, the experiences made by theoretical and practical criticism of the *ancien régime* can still be relevant.” (Gerstenberger, 2007: 686-687)

⁵⁹ “The attempt to replace war and inequality with law is not merely utopian – it is precisely self-defeating. A world structured around international law cannot but be one of imperialist violence. The chaotic and bloody world around us *is the rule of law*.” (Miéville, 2005: 319)

⁶⁰ “For all revolutionary movements begin with the romanticism of illegality, but hardly any succeed in seeing their way beyond the stage of opportunist legality... For by surrounding illegal means and methods of struggle with a certain aura, by conferring upon them a special, revolutionary authenticity one endows the existing state with a certain legal validity, with a more than just empirical existence.” (Lukacs, 1971: 263). This passage can be interpreted as a caution towards the objectification of the state or the legal form, similar to a ‘disease’, i.e. the inability to see the state as nothing more than a power factor (*ibid*).

engagement with extraterritoriality as an ignored facet of social struggle, state formation and international legal ordering.

The first section presents existing historical materialist accounts of IL that show the most potential for conducting a history of extraterritoriality, namely Claire Cutler and China Miéville's work. If empirically rich, Cutler's emphasis on private IL and the autonomy of the merchant legal order, coupled to a theoretical attachment to the commodity form theory, turns our attention to a more in depth analysis of Miéville's work. The second section questions the suitability of his commodity form theory of IL for this project. Indeed, he does provide an argument for articulating extraterritoriality as an outcome of capitalist commercial interests, by focusing on mercantilism and imperialism as conditional to the development of modern IL. However, he cannot explain why in some cases processes of juridical expansion clashed with or were driven by other dynamics. In effect, he does not allow a theoretical distinction between pre-19th and 19th century extraterritorial practices, and thereby thwarts a necessary debate on the specificity and agency of juridical expansion as strategies of accumulation. This critique is historically grounded but leads us to question theoretically Miéville's objectification of the categories of form analysis, his method of 'shared characteristics', and his use of Pashukanis's analogy between individuals and the bourgeois state form.

The third section explores PM in response to these limitations, since it consists in a historically grounded and 'specificity-driven' method. Recent PM work has started to theoretically address IL, but the section concludes that it remains limited to 'internal' processes of state formation. If Bachand & Lapointe (2010) provide an angle to the problem of legal agency through law as a discursive practice, a history of extraterritoriality also requires a conceptual framework that can explain the peculiarity of 'external' and 'outwards' institutional processes of juridical expansion. In response to this, the fourth and final section proposes an analytical framework based on the differences between jurisdictional accumulation and modern extraterritoriality. These differences are assessed empirically through four methodological angles: legal class relations, legal institutions, legal and political thought and, finally, geopolitical orders and dialectical dichotomies. This grid will guide the following historical chapters, respectively addressing the cases of early modern Spain, France and England.

Looking for the Politics of Extraterritoriality

Though theoretically limited for the aims of this thesis, Cutler's work will be examined for introductory purposes, specifically its critique of mainstream approaches and its historical analysis of early modern private IL. Secondly, Miéville's commodity form theory of IL will be presented. The following section will then question the latter method for developing a history of extraterritoriality.

Transnational Merchant Law and the Legitimacy Crisis

Cutler (1999; 2003) develops a conceptually wide historical materialism 'as a philosophy of praxis'⁶¹ and as a method of critical analysis' (2008: 202), focused on contemporary developments in transnational economic law. Through this she raises the issue of the rise of private authority in international relations and IL, identifying a fundamental 'legitimacy crisis'. Mainstream theories are inadequate in explaining the current relationship between IL and international relations, she argues, since they obscure the 'real' configurations of power through their narrow conception of states as the only 'legitimate' actors. Cutler shows how power configurations today have gone beyond the distinction between public and private spheres. Transnational corporations and other dominant actors have managed to increase their participation in decision making over international affairs and specifically, over the rules and behaviour of their businesses. However, they have done so by acquiring *de facto* significance while remaining *de jure* insignificant. "Public definitions of authority and law block the association of politics with private activity and actors, while state-centric and territorial theories of rule confine political activity to the state and create impediments to recognizing the political nature of private international trade law." (Cutler, 2003: 60)

Accordingly, a currently entrenched mercatocracy⁶² has caused a disjunction between theory and practice at the root of IL's legitimacy crisis. "The law has ceased to constitute, mirror and, in some cases, to discipline its 'subject', the state and state practice. The 'subject' has in fact, been reconfigured in the legally 'invisible' form of the transnational corporation." (2001: 147). IL's legitimacy crisis lays in the 'problem of the subject', that is the question of who has, or can have, legal personality. Cutler concludes that the inconsistencies between liberal democracy and 'the new private authority over international affairs' (1999) are a consequence of the dichotomy between on the one hand the normative and theoretical

⁶¹ "[T]he philosophy of praxis postulates the immanent unity of material and ideological conditions in an historical process of becoming." (Cutler, 2008: 216)

⁶² This corresponds to the rise of a new Law Merchant (transnational economic law, law of private international trade, and international business law) since the 19th century. This involves the renewed preference for private arbitration over adjudication, where privatized processes of dispute resolution are replacing dispute settlement by national judicial authorities in areas such as securities, antitrust, competition law, regulations and consumer protection.

structure of liberalism, and on the other the state-centric unit rigidity of realism. This dovetails with the critique of Neoliberal Institutionalism developed in the previous chapter.

Cutler's use of dichotomies, whether for property rights ('bundles of rights' and 'ownership of things') (2002) or jurisdictional / legal-political orders (national and international, public and private) is helpful in terms of highlighting how these have come to structure the development of IL into public and private spheres. This approach also helps to understand how these dichotomies have brought IL to a crisis of legitimacy, while also limiting the emancipatory and socially wider potential of law by narrowly framing the terms of capitalist competition between the two forces of fragmentation and centralisation. Moreover, they provide a template to make sense of judicial globalisation and Neoliberal Institutionalism's analysis of the shift from the principle of territorial sovereignty to its disaggregation.

However, they only go so far. The gains in terms of a historically broader and simpler picture of the rise of private IL come at a cost from the point of view of the history of extraterritoriality. If the present project is more concerned with the effect of extraterritorial regulation on the construction of *political* institutions, and challenges the minor or ignored role of extraterritoriality in the construction of *public* IL, its findings are also in contention with certain aspects of Cutler's historical arguments. First, it must be noted that Cutler's historical account of the law merchant from the late Middle Ages is an important contribution. Its focus on mercantile and 'private' legal mechanisms provides an important aspect of the early modern history of extraterritoriality, arising out of growing trade relations between competing empires and the need to regulate these relations (mainly with the Ottoman Empire, but also China and North Africa).

In spite of this, this study finds the following argument problematic:

"the law merchant order occupied a space external to the local political economy and feudal mode of production. Even more importantly, the law merchant created property rights and entitlements that were quite inconsistent with medieval conceptions of property – entitlements that were more consistent with property relations that would later be associated with capitalism. In addition, while there was no distinction between public and private international law, the merchant community provides an early hint of what was to become the private realm later with the development of capitalism and the juridification and privatization of commercial relations." (Cutler, 2003: 110-1)

Above, Cutler (2003: 100-104; see also 2002) uses two conceptions of property, not only to exemplify the shifts from non- and pre-capitalist social relations to capitalist social relations, but also as a way to understand their continued dialectical operation in the expansion and reproduction of capitalism. In other words, if she sees the late medieval-early

modern autonomy of the merchant order as an anticipation of private IL and capitalist property relations⁶³, characterised by the notion of ‘bundles of rights’, she argues that this notion is still pertinent in the 21st century. Although she rejects claims of ‘remedievalization’, she retains the use of the ‘bundles of rights / ownership of things’ dichotomy to understand “the dialectical relationship between capital and labour and the tension between national and transnational productive relations... One conception of property is associated with national patterns of capital accumulation, while a competing conception relates to transnational patterns of accumulation.” (2002: 232)

However, this is problematic. For one, this transhistorical use of these notions of property generalises a variety of legal processes and abstracts them from their socio-political context. Secondly, though this point is secondary and more open to interpretation, it contradicts with Wood’s understanding of property relations as a contested space located in specific economic, political and legal contexts. This is problematic considering Cutler’s reliance on Wood’s arguments (2002).

Crucially though, these dichotomies do not do justice to other processes of accumulation that overlapped over the boundaries of the law merchant and forms of sovereignty and ownership (i.e. property relations). Extraterritoriality, or the evolution of extraterritorial regimes and relations do not fit into the separated focus on the development of the law merchant. If extraterritoriality did develop from the increasing presence of merchants and the development of trade in the Mediterranean basin and then further east, the development of consular jurisdiction and the treatment of foreigners was not limited to the regulation of trade. In other words, the history of extraterritoriality does not follow that of the law merchant and specifically, does not fully corroborate the argument on the autonomy of the merchant order. It might have contributed to it to a certain extent, but this history, as will be shown in subsequent chapters, reveals a broader set of legal strategies and relations between sovereigns. Merchant and non-merchant actors displayed different patterns of property relations based on personal and feudal, or absolutist and local/regional institutions with jurisdictional power. These legal strategies display patterns that reproduce semi-feudal and absolutist forms of sovereignty and jurisdiction, and do not anticipate capitalist processes such as those of land improvement and the rights and conceptions of property that accompanied this specifically capitalist strategy of exploitation. Thus, Cutler’s framework of analysis is not historically adequate for an analysis of extraterritorial or more accurately, juridically expansionary regimes.

⁶³ In Cutler’s words, merchant commercial transactions “embodied and anticipated forms of property and ownership that departed considerably from incidents of property ownership generally associated with the feudal system” (2003: 132); “to the extent that commercial law was applied extraterritorially in the medieval phase, it was in a purely private context” (2003: 136); “Merchant autonomy in law-creation and dispute resolution emerged more as a result of the inability and unwillingness of local authorities to regulate international commercial relations” (2003: 139-140) .

Finally, Cutler does not provide a consistently coherent theory of IL. As a methodological patchwork of new Marxist and Neo-Gramscian (Harvey, 1990; Cox, 1996; Wood, 2003; Miéville, 2005) *but also* Post-structuralist arguments (Jameson, 1991; Sousa Santos, 2002; Koskeniemi, 2001), Cutler's approach (2008) ignores certain fundamental inconsistencies between some of these authors. For example, she relies on the commodity form theory of law but also declares international trade law to be both oppressive and emancipatory (2002: 251; 2008: 202), the latter point being denied by Miéville. Moreover, she intertwines Wood and Miéville's work without noting their important theoretical and empirical discrepancies. This makes it difficult to extract from her work a coherent methodology to address the problem of legal agency. Finally, her later work adopts more explicitly the model of the commodity form theory of law. If this is justified by her emphasis on the law merchant and the development of private IL, it nevertheless leads us to consider more thoroughly Miéville's commodity form theory of IL.

From Pashukanis to Miéville

The commodity form theory of law starts from the basis that the exchange of commodities requires a form of ownership of the commodity exchanged, and a recognition of such ownership by both parties involved. These parties – individuals – become abstract owners of commodities. In other words, commodity exchange requires private property, which in turn generates the legal personality of individuals. From this relation, law is developed as a body of regulations to ensure the terms of the exchange. In the same way as commodities are bearers of value,⁶⁴ legal subjects are bearers of rights. This means the legal relation, in parallel to the commodity relation, exists at the level of circulation as opposed to production; more specifically, the sphere of production is irrelevant to the *emergence* of the legal subject. "Relations of production must be analysed to make sense of the particular class relations under capitalism, but the *legal* relations remain an expression of the relations of circulation" (Miéville, 2005: 93). Thus, the increase and global expansion of trade (i.e. commodity relations) from the 16th century onwards resulted in the gradual generalisation of a particular legal form. If historically content-specific, this legal form is in its most basic

⁶⁴ "There is a physical relation between physical things. But it is different with commodities. There, the existence of the things *qua* commodities, and the value relation between the products of labour which stamps them as commodities, have absolutely no connection with their physical properties and with the material relations arising therefrom. There it is a definite social relation between men, that assumes, in their eyes, the fantastic form of a relation between things. In order, therefore, to find an analogy, we must have recourse to the mist-enveloped regions of the religious world. In that world the productions of the human brain appear as independent beings endowed with life, and entering into relation both with one another and the human race. So it is in the world of commodities with the products of men's hands. This I call the Fetishism which attaches itself to the products of labour, so soon as they are produced as commodities, and which is therefore inseparable from the production of commodities." (Marx, 1976)

‘embryonic’ sense, the assumption of private property and legal personality for the exchange of goods.

To apply this theory to IL, a second premise is attached to the above: “[s]overeign states coexist and are counterposed to one another in exactly the same way as are individual property owners with equal rights.” (Pashukanis *in* Knox, 2009: 416). The analogy between individuals and states assumes that states are formally equal sovereigns in the same way as individuals are abstracted as equal owners of commodities. However, Pashukanis’s theory of the state argues that the development of public authority is *contingent* to the legal form.

“Pashukanis’s claims that (proto-)international law historically predates domestic law have nothing to do with any putative ontological primacy of the international sphere: it is, rather, because law is thrown up by and necessary to a systematic commodity-exchange relationship, and it was between organised but disparate groups without superordinate authorities rather than between individuals that such relationships sprang up.” (Miéville, 2005: 131).

This enables Miéville to clarify the difference between the ‘legal form’ and ‘law’, where domestic law and IL are understood as two ‘moments’ of the legal form:

“what we might call *proto*-international law, the legal form regulating relationships between organised social groups, predates capitalism and the bourgeois state. Only when the bourgeois state becomes the central subject of those relations can we with full justification call them international law: that is when the ‘international’ is born. But *the form of the relations* already existed. (...) Thus the state is central to the *development* of law, domestic and international, but not to the legal form itself.” (2005: 132).

Thus, two conditions are essential for the transition from ‘inter-societal’ legal relations (proto-IL) to IL: the emergence of the bourgeois state as standard political unit of international relations and the universalisation of commodity exchange, as the economic and military means of reproduction of the bourgeois state form. Capitalism can only be fully grasped once these two conditions come into play. The phenomenon that captures at the same time the emergence of the bourgeois state and the expansion of trade is mercantilism, as an ‘economic-political strategy for state-building’⁶⁵. This argument constitutes the

⁶⁵ Mercantilism in the 17th and 18th centuries was the state sponsoring of merchants whose capital and profit arose out of trade, i.e. as exchange value, namely the difference in the selling and buying price of the commodity. Mercantilism (or commercial capital) is generally contrasted to capitalist production, where capital or profit is met by surplus value arising out of the flexible relation between labour and other costs of production. Miéville holds back from defining mercantilism, which is astonishing considering its centrality to his thesis. Ultimately, his definition is broad and multi-layered. The term is used interchangeably as an economic system, a state policy, a set of doctrines, a form of political relations, the ensemble of maritime and merchant law, and even as an adjective for sixteenth century ‘adventuring’ or colonialism (2005: 229). From a cryptic formulation in the introduction (“mercantilism can best be understood as a form transitional to capitalism...The economic in the

backbone of the commodity form theory of IL and is used to justify a definition of capitalism based on commodity exchange⁶⁶. This definition implies that:

“the seventeenth century’s political forms were transitional to capitalism. It should be borne in mind, though, that whether or not Europe in the seventeenth century and even eighteenth century is deemed so transitional, it is undeniable that this mercantilist era saw the massive expansion of international trade, central to the structure of the most powerful European states. It is during this period that the **categories concomitant on that trade** – the legal forms – begin to universalise. This was the birth of true international law. As trade became global, and definitional to sovereign states, the international order **could not but become** an international legal order.” (2005: 200, added emphasis)

“Even more than the epoch of the absolutist state this is the epoch of the *mercantilist* state – it is in the very fabric of the most powerful sovereign states of this age that they are international, maritime and mercantilist. Mercantilism (and its laws) was crucial for the consolidation of the sovereign state – absolutist or otherwise – and a transition to a capitalist world economy.” (*ibid*: 203)

Thus, if the commodity form theory of law accounts for the continuity of history (the legal form remains while law as content changes), it also determines the transition to capitalism. 17th century mercantilism, as socio-political content, drove the change to a global capitalist political economy, and this change was manifested in the development of maritime and merchant law.

As a final point to this presentation, Miéville claims as a contribution to Pashukanis, that the commodity relation necessarily implies coercion⁶⁷. International trade demanded the protection and constant drive of militarily competing European imperialisms. As a market, international trade also generated legalisation. These two outcomes enshrined early modern polities, however unequal politically, in a system of equal exchange and coercive violence. IL

political of mercantilism is the flipside of the political in the economic – the commodity – in international law.” (2005: 7) to chapter five, where we get a sense of ‘mercantilist state-building’ as a legal phenomenon through an analysis of the Navigation Acts, the East India Companies, and the debates over the freedom of the seas (2005: 204-214). Less clearly, “just as mercantilism is distinct from but directly related to capitalism, so earlier colonialism is distinct but related to general and to ‘new’ imperialism.” (2005: 230). However, in Chapter 6, mercantilism is defined as a dominant system and ‘economic-political strategy for state-building’, and can be dated from 1600 to 1776 (*ibid*). Another important difference is that between English mercantilism (East India Company and Navigation Acts) and the French variant (or Colbertism). Thus, in sum, mercantilism refers to ‘European state-consolidation’ (2005: 233), maintaining a ‘minimal’ international legal order, the DPE. As it ignored colonies’ legal identity, this system became untenable from the late 18th century.

⁶⁶ “The analysis of mercantilism as central to the transition to capitalism is not simply an addendum to the commodity-form analysis of international law: it is constructed on exactly that theory’s dialectical formulations about the nature of commodity exchange.” (Miéville, 2005: 224)

⁶⁷ “Violence – coercion – is at the heart of the commodity form. For a commodity meaningfully to be ‘mine-not-yours’ – which is, after all, central to the fact that it is a commodity that will be exchanged – some forceful capabilities must be implied. If there were nothing to defend its ‘mine-ness’, there would be nothing to stop it becoming ‘yours’. Coercion is implicit.” (Miéville, 2008: 113) Thus, deviation, sanctions and violence are inherent to international norms rather than external pathological manifestations.

(as a legal system without superordinate authority) became the necessary structure of capitalist international relations with colonialism and imperialism as inevitable corollaries.

For Miéville, Pashukanis provides an explanation for the tenacity of the problem of the source of international legal obligation. Since the legal form emerges in commodity exchange irrespective of a superordinate authority (the 'contingency' of the state), mercantilism assures that this process also occurs and crystallises at the international level. In other words, the problem of the source of international legal obligation (or the Austinian challenge) is not a problem, but a condition of international relations. However, this also means *all international social relations* are trapped in the ambiguity or indeterminacy characterizing IL (a condition best exposed by Koskeniemi, 2005). It follows that analytically isolating legal relations ignores these conditions and reproduces the illusion that the problem of the source of international legal obligation is merely an obstacle that IL will in time overcome:

"The problem *is* actually intractable. In the commodity-form theory, law is simultaneously a form inhering between two free, abstract individuals *and* a necessary subjection to coercion. For this reason, there *is no* neat solution. It is not the legal theory which is paradoxical, but the relations that it represents." (Miéville, 2005: 149).

In sum, IL and international relations are wedded by imperialism, as the capitalist driver of mercantilism and military coercion, to a life of mutual indeterminacy. But to what extent can this theoretical structure historically account for extraterritoriality and other legal strategies of expansion?

A Historical Critique

This section argues that the commodity form theory of IL can only achieve the first of the two historiographical tasks set out in the previous chapter, and that this deficiency brings to light some of its theoretical weaknesses. For the first task, i.e. incorporating the transition to capitalism into the history of juridical expansion, Miéville proposes mercantile imperialism as a central explanatory process intrinsic to the development of IL and to the capitalist state system. He thereby provides a strong historical critique of Neoliberal Institutional accounts that posit extraterritoriality as a regulating device detached from imperialist projects. Moreover, this critique reveals that coercion is not logically separable from judicial and economic liberalism. However, Miéville's account is problematic for achieving the second task, i.e. avoiding an over-arching structure that bundles together and pre-determines the causes of juridical expansion and extraterritoriality. In other words, Miéville's narrative does not account for the differing legal strategies of expansion in constructing early modern forms

of sovereignty, in European and non-European polities. Crucially, this missing history cannot simply be added to his narrative. The commodity form theory of law itself is put into question by the need to account for historical specificity, since its method is based on states' external similarities.

The following will firstly retrace how the structural aspect of commodity form theory objectifies certain social relations while excluding others, such as discursive practices. Secondly, the section will focus on the methodological reasons for this structuralism, and contest its use for the history of early modern state formation and juridical expansion.

Legal and Political Thought

Starting from the abstract, non-capitalist legal form, Pashukanis and Miéville argue this form is then reconstituted by changes in social content, i.e. commodity capitalism driven by mercantilist states. The issue is that once this change occurs, the legal form becomes again a closed and monolithic structure of coercive and paradoxically free international legal relations. This structure translates into the international rule of self-help or balance of power. The absence of sovereign world authority in effect *positively* authorises subjects to rely on coercive violence. The argument arrives at a Hobbesian conclusion where the assumption of 'might is right' conceptually undergirds the commodity relation as coercive. The important difference being that this rule of 'might is right' is not a negative condition of human nature, but a positive condition of capitalist relations. One reviewer, for example, described Miéville as "an 'upside-down' Morgenthau" (Messineo, 2008: 663). In the end, his commodity form theory of IL reproduces a Realist concept of 'capitalist international anarchy' as a structure of legal imperial violence⁶⁸.

Therefore, although Miéville acknowledges the transformative role of social content, form analysis retains this structure of legal imperial violence as a fixed horizon from which social content cannot escape in its discursive or judicial form. For example, as a discursive form, the role of political and legal thought in the construction of IL is sidelined, if not excluded. Specifically, the evolution of private property in the history of political and legal thought is deemed secondary to the emergence of private property as form. However, as Fine (2002: 101) for example remarks: "The advance which [Adam] Smith made over the mercantilists was that the latter treated private property 'as a purely objective being for man' whereas Smith recognized that labour is the 'subjective essence' or 'principle' o[f] private

⁶⁸ See Knox (2009: 425-426) for a discussion of how other forms of violence are constitutive of the commodity relation.

property”.⁶⁹ The commodity form theory rules out the potential relevance of this difference. Consequently, legal form analysis reifies a specific mercantilist conception of private property that does not apply to Britain. More generally, situating political and legal thought *outside* or as secondary to the emergence of both the legal subject and bourgeois state reduces the history of political thought to an instrumentalist function.

To be more exact, Miéville’s discussion of Hugo Grotius (1583-1645) and John Selden (1584-1654) goes some way towards incorporating discursive practices (2005: 208-214). As each scholar argued for the regulation and deregulation of maritime sovereignty, they thereby attempted to develop new juridical conceptualisations of the political and economic spheres. However, since the analysis remains separated from the social relations and debates in which each scholar evolved, it fails to take more seriously the implications of their divergences and of the heterogeneity of state formation on legal thought and practice. For example, on this issue of Grotius and Selden’s importance for the transition to a ‘modern maritime polity’, Miéville (2005: 214) insists that Adam Smith’s (1723-1790) role was not transitional. However, Teschke (2011c) points out that there is a difference between 17th century ‘open’ seas in the context of military rivalry, and 19th century ‘free’ seas for the exchange of trade, weakening the argument for 17th century ‘Grotius-Selden’ mercantilism as the primordial mode for the universalisation of trade and IL. This example of the crucial differences between 17th and 19th century international relations, and thus of different instances of mercantilism, is indicative of the competing social contexts in France and England and applies to both issues of private property and theories of maritime law. It indicates that legal and political debates, and their social context, can be crucial to the development of international legal practices. Sidelining or excluding this intellectual history objectifies the international legal relation as one of commodity exchange and in the end restricts the explanatory potential of commodity form theory.

This objectification has already been criticised by Marxist scholarship (Marks, 2007: 199; Bowring, 2008; Bachand & Lapointe, 2010; Knox, 2009). They broadly argue for a more dynamic and ‘context-dependent’ definition of the legal form, able to encompass a broader plurality of international legal actors as well as the ‘reality of judicial activism’ (Marks, 2007). Nevertheless, these authors have as yet shied away from constructing an alternative theory. And, as Knox writes: “legal argument can never address systemic or structural causes...if we agree that the legal form is a result of commodity exchange - and international commodity exchange is global capitalism – then unless the legal form is used to abolish its own

⁶⁹ The discussion here cannot digress into the different concepts of private property, and has to limit itself to noting the existence of such difference in relation to social context. See Skinner (1978a; 1987b), Tuck (1999), Pagden (1995) Jahn (2000; 2006) and Wood (2008) for socially contextualised histories of political thought that further emphasise the different conceptions of property and their role in constructing legal principles and institutions. This discussion will also be returned to in the following historical chapters.

conditions it will never be able to overcome these problems.” (2009: 432). If an alternative Marxist theory of IL rejects the primacy of commodity exchange, can legal argument address systemic or structural causes? Historically disagreeing with the ‘international legal form-commodity exchange’ equation is relatively facile; the difficult challenge is how such disagreement translates theoretically. Before taking on this challenge in the following sections, Miéville’s historical method needs to be discussed more fully. Only then will it be possible to attempt an answer to the difficult question of legal argument and structural causes, or the agency of legal strategies.

‘Shared characteristics’ and the Individual-State Analogy

First of all, it should be noted that the separation between historical and theoretical critique is problematic, and should be bracketed. Moreover, the distinction has already been the object of contention. For Miéville, the (historical) transition debate⁷⁰ is only relevant to the political *content* of legal forms, since the legal form predates capitalism. Moreover, the universalisation of the legal form occurs at the (theoretical) level of the *value* form, not production (2005: 201). However, this only holds if one accepts the primacy of form analysis and more generally the analysis of political economy from the premise of categories as forms of social relations⁷¹. This primacy is also challenged by an approach that questions a strict separation between theory and history. This section argues that form analysis can be more fundamentally criticised from the standpoint of historical dialectics (Heine & Teschke, 1996) and the ‘philosophy of internal relations’ (Ollman, 2003)⁷². By contesting the theorisation of private property and commodity exchange as homogeneous and founding abstractions, the debate on the role of mercantilism as transitional becomes essential at both levels of form and content (i.e. theoretically and historically). If so, Miéville’s theory can be challenged historically. In effect, it excludes *a priori* the possibility of colonial and mercantile practices that universalised feudal or absolutist (i.e. non-capitalist) configurations of state power and property relations. The critique is thus twofold: theoretically, commodity form theory does not allow for the possibility of historical specificity, and historically, this condition is confounded

⁷⁰ For a collection of the protagonists and arguments in the transition from feudalism to capitalism debate, see Aston & Philpin (1985).

⁷¹ For example, Binns criticizes Pashukanis as follows: “the real power of his analysis is in abstraction, in locating the source of what he refers to as the ‘legal form’. But he never brings his theory back down to earth again, and this lack of concreteness prevents him understanding the role of law as capitalism itself develops and changes. He leaves us with a view of law under capitalism as an unchanging category instead of as an evolving process.” (Binns, 1980: 100). Similarly, form analysis has been criticised for assuming, *a priori*, public law and criminal law to be secondary manifestations of private and contractual law (Fryer *et al.* 1981). Even Fine (2002) struggles to follow the primacy of form analysis through to Miéville’s conclusions. Although he starts his critique of juridic relations from commodity relations, he argues the state form appears only *after* the emergence of capitalist relations of *production*.

⁷² I am grateful to Can Cemgil for introducing and discussing the implications of Ollman’s work for this study.

by a revisionist history that emphasises the heterogeneity of state formation and extraterritorial practices.

Since he sees these practices to be irrelevant to the commodity form theory, Miéville's defence is to focus on states' 'external similarities'. He compares the historical work of Teschke (2003) and Grewe (2000) by noting indeed that Teschke assesses the specificities of European states, whereas Grewe looks at their similarities:

"for the historian of international law, the focus on these states' internal dynamics to point out their differences leaves relatively unexplored their external dynamics, in which certain shared characteristics between absolutist and non absolutist states are visible. From this perspective, though care must be exercised, it is possible to make generalisations about the various state forms ranging from the 'high' absolutism of the French model even to the English non-absolutist model... There were of course unique political forms in each country. But one risks obscuring as much as illuminating in focusing so carefully on the specifics of a state form internally that the shared changes in European states in general goes unnoticed." (2005: 202-3)

This raises an important problem: should the history of IL focus on the internal or external dynamics of states, and to what extent can one identify this 'inside and outside', a *fortiori* during the early modern period? By focusing on states' external dynamics, Miéville is led to apply anachronistically abstract conditions of the capitalist legal form of the state to heterogeneously constituted societies, i.e. geopolitical spaces in which capitalism was absent⁷³. Three arguments are henceforth developed.

First, an analysis based on external similarities particularly obscures the history of the origins of extraterritoriality. It excludes the role of British foreign policy after the 17th century in determining the change in 19th century colonial and imperial legal relations. Specifically, it does not allow us to account for how these relations were modelled on the experience of agrarian capitalism and common law, rather than by commodity exchange. In other words, commodity exchange cannot explain all forms of imperial legal practices. In most cases, extraterritoriality was a transformative process for non-European states, which resulted in the expansion or reproduction of the imperial state's form, albeit not necessarily and identically the bourgeois capitalist state. Moreover, juridical expansion is characterised by the manifestation of the social struggles *actually constructing* the 'shared characteristics' Miéville uses as analytical basis. Focusing on states' external similarities assumes the success or unimportance of legal strategies of expansion, neither of which are satisfactory assessments.

Secondly, concerning broader analyses of state formation, it is useful to discuss the

⁷³ In the 17th century, the various political actors of the Holy Roman Empire and even of Spain and France were struggling to define the conceptual and geographical frontiers of their sovereignty (e.g. Teschke, 2003; Lacher, 2006; Lapointe, 2009; from a different theoretical perspective, see Bartelson, 1995). This will be further shown in chapters three and four.

more controversial case of 17th and 18th century France. The kingdom still functioned administratively and judicially according to feudal and patrimonial rights, especially in the provinces (Beik, 2005; Miller, 2008). The question becomes: what was the international legal form or content for Louis XVI other than the personal extension of his sovereignty? In other words, how should one understand 'external similarities' when faced with *personal* sovereignty? Miéville does not make clear in his analysis why the legal form as commodity form justifies and/or produces coercion *rather* than the feudal remnants of 'unspatially' fixed sovereign rights expressed through the machinery of the state.

Thirdly, as Marks notes: "The sharp line [Miéville] draws between international law's inside and its outside does not seem to do justice to his own characterization of international law as a part of political processes." (Marks, 2007: 207). As such, the theoretical move of extending the legal form that inheres between individual owners of commodities to the state form clashes with a conception of IL characterized by the interconnection of political processes. This move consists in Pashukanis's analogy between individuals as owners of commodities and the bourgeois state form.

Pashukanis develops the concept of the bourgeois state form in a short but groundbreaking essay (*in* Miéville, 2005: 321-335). He equates the rise of institutions such as administration, bureaucracy, trade and other emerging bourgeois professions with that of international lawyers, their institutions and ideas. However, this claim brushes over fundamental differences. After Westphalia and up to the 19th century, continental 'IL' (or the DPE) consisted mainly of diplomacy and burgeoning foreign policy. This order was conducted by aristocrats and the military in defence of dynastic interests and of a European 'public' identity that crystallised the private family interests of European monarchs *against* a rising bourgeois (and revolutionary) class (Teschke, 2003; Keene, 2009; Belissa, 1998). This was an important struggle, which marked the initial development of public IL and diplomacy as separate and antagonistic strategies to the rise of capitalism. What is more, the differences between continental and British conceptions of legal theory, IL and diplomacy are significant (e.g. Sugarman, 1986; Grewe, 2000; Kelly, 1992). Certain French colonies, particularly in the Caribbean, were also used by the monarchy as a way of maintaining this particular 'public/private' order, while signs of the ambiguity and clash between conceptions of European legality and political ideas were particularly laid bare in the confusion of colonial rule (Knafla & Binnie, 1995; Benton, 2010; Johnston, 1973)⁷⁴. These legal strategies of expansion contest the homogeneous and determinist interpretation of the period of the DPE.

Thus, Pashukanis's concept omits important conceptual, geopolitical and class divergences in the development of domestic public law and public IL. The construction of

⁷⁴ This struggle between different conceptions of legality also helps to explain the different reactions and roles of lawyers in the English and French revolutions (see Burrage, 2006 for an account of these differences).

modern international legal forms cannot be reduced to the generalisation of the bourgeois state form, based on commodity exchange and a reified notion of private property.

In sum, if it constitutes a necessary possibility in the horizon of debates over the progressiveness of law⁷⁵, Miéville's conclusion has to be revised in light of the historical flaws of Pashukanis's concept of the bourgeois state and the structural limits of form analysis. What remains to be shown is whether accounting for processes of juridical expansion can, against Miéville's charge, illuminate more than it obscures. If a positive answer would still be premature, the preceding discussion has shown at least why it should be attempted.

In effect, the commodity form theory of IL is not sufficiently adequate for a critique of the Neoliberal Institutional framework and concept of judicial globalisation. Such a critique requires a theoretically more open and sociologically richer historical materialist approach that can explain the various relations between states and other legal institutions across early modern Europe and its colonies. The following section will examine whether PM, expressly concerned with the internally specific historiography of (international) social relations, can provide such a framework.

PM

Foundations

The following retraces the development of PM and its focus on specificity, as an answer to the second set of critiques made against Miéville's method. PM is rooted in Robert Brenner's (1976, 1977) historical work on early modern Europe and on the transition from feudalism to capitalism. His argument, later extended by Wood (1981, 1995) and Comninel (1987, 2000), asserted that capitalism originated in England as a result of specific social conflicts in the agrarian economy. This work is grounded in analyses of property relations to assess the relationship between classes, institutions and power. It suggests that history, past and present, is nothing but the social, i.e. political, juridical and economic conditions, in which all phenomena are grounded and contested. PM's first aim is to detach itself from mid to late 20th century economistic Marxism, moving away from deterministic and structuralist orthodox assumptions. It does so by focusing on the regionally specific resolutions of social conflicts that follow no pre-determined script. It also re-asserts the crucial role of politics as social power struggles in the overall development and trajectories of social property relations, with a specific focus on explaining and drawing out the wider implications of the separation of the

⁷⁵ "I have repeatedly argued that we must allow the possibility of a theory which posits the legal form as a real and active factor in social relations, yet denies that it can be a force for progressive change, or even the maintenance of order (itself only self-evidently a good for conservative critics). In Pashukanis's theory, we have precisely such a theory." (Miéville, 2005: 98)

political and economic spheres under capitalism. It thereby re-asserts the role of the political as a firm basis to the economic sphere, and hence, to the mode of production. As Wood authoritatively asserts:

“[R]elations of production are, from this theoretical standpoint, presented in their *political* aspect, that aspect in which they are actually *contested*, as relations of domination, as rights of property, as the power to organize and govern production and appropriation. In other words, the object of this theoretical stance is a *practical* one, to illuminate the terrain of struggle by viewing modes of production not as abstract structures but as they actually confront people who must *act* in relation to them.” (1995: 25, original emphasis)

The important problem this raises is the controversial relationship between base and superstructure, to which Wood replies in the following way:

“Political Marxism, then, does not present the relations between base and superstructure as an opposition, a regional separation, between a basic ‘objective’ economic structure, on the one hand, and social, juridical and political forms, on the other hand, but rather as a continuous structure of social relations and forms with varying degrees of distance from the immediate processes of production and appropriation, beginning with those relations and forms that constitute the system of production itself. The connections between ‘base’ and ‘superstructure’ can then be traced without great conceptual leaps because they do not represent two essentially different and discontinuous orders of reality.” (1995: 25-26)

The particularity of this approach is its non-economistic and politicised aspect. A first advantage for this discussion is the emphasis on social contestation, since it translates empirically into spatio-temporally open forms and content of legal activity. In contrast to more ‘classical’ Marxists, PM adopts a non-functionalist conception of the interpenetration of social relations between spheres of production and circulation (i.e. capitalism not as an economic but a social relation that is politically constituted). If the juridical is part of this ‘continuous structure’ Wood identifies, this means that it is not approached as an expression of the commodity form, but rather as a terrain of social conflict.

‘Internationalising’ PM has consisted in analyses of property relations to explain the emergence of public and private institutions that cut across and shape the domestic/international dichotomy. Therefore, the ‘international’ is put aside as a criterion for delimiting the field of enquiry, although its theorisation remains a central concern (e.g. Rosenberg, 2006). If Rosenberg (1994) critiqued the Realist ahistorical narrative of the modernity of international relations, by retracing the emergence of sovereignty before and after capitalism, Teschke (2003) developed a geopolitically differentiated narrative of

European state formation from the Middle Ages to the 19th century out of Brenner's work on social property relations⁷⁶. The 'social-property approach' "is applicable to all geopolitical orders, be they tribal, feudal, absolutist, or capitalist." (Teschke, 2003: 47) "'Internal' changes in property relations are themselves subject to 'external' pressures and alter geopolitical behaviour" (*ibid*).

In effect, the modern states system, as juridically equal but politically unequal, was only possible *after* the expansion of capitalist relations of production, since only these provided the impetus for the distinction between public sovereignty and private civil society (Rosenberg, 1994). This process is hence sufficiently identifiable only from the 19th century. The transition to capitalism was not a homogeneous and natural progression from the system of sovereign states supposed to rise out of the Peace of Westphalia (Teschke, 2003). Instead, agrarian capitalism in England and continental absolutisms in France and the Holy Roman Empire both separately emerged out of feudalism, and through a complex process of contested refraction and/or uneven and combined development confirmed the forms through which capital accumulation justified itself politically, i.e. the separation between the sovereign nation-state and transnational capital flows.

However, if its analytical starting points are property relations, how does PM explain the link (or lack thereof) between social legal relations and geopolitical legal relations? Or, in other words, how did the development of private property, of the individual as citizen and of the institutions to maintain them translate into the structure of IL? As 'the legal conscience of the civilized world' without superordinate authority, what was its role in shaping non-European state formation and in legitimating and standardising European colonisation?

To answer these fundamental questions, it should be recalled that PM has only recently paid *direct* attention to the 'legal' aspect of social relations. From Comninel (2000) to Dufour (2008), the social-property approach has been mobilised to fill this gap, though as Dufour argues, the legal dimension is theoretically implicit in its original purpose⁷⁷. There is a presumed tension between the fixed aspects of the law, such as the legal form or property right, and the process or interaction involved in legal content or the property relation. PM challenges the idea of law as an expression or form of social relations, and approaches it from the standpoint of social process. Therefore, this tension between property right (form) and property relation (content) is merely apparent, and the challenge is to explain why an appearance of things takes over the meaning or life of things; in other words, why a particular right prevailed over others in the struggles over content, and thereafter retained that

⁷⁶ In their simplest sense, social property relations are understood as "nodal points of intersection in which power relations shape social relations" (Teschke, 2010: 47).

⁷⁷ "En somme, sans la prise en compte du droit, le cadre d'interprétation herméneutique des stratégies des classes sociales ne peut pas être reconstruit avec acuité." (Dufour, 2008: 77) (*In sum, it is not possible to accurately set up a hermeneutic interpretative framework for the strategies of social classes without taking into account the role of law.* Personal translation)

prevailing position of legitimacy beyond the initial struggle that produced it. This is an essential function of modern law, to institutionally preserve the fruits of a social struggle without the burden of winning the struggle anew.

However, recognizing this formal function does not justify or automatically lead to negating the continuing social struggles that challenge the formalisation of a right. In other words, if content does not stop in the face of the form, and if the goal is to map out the various challenges to the building of the capitalist state and sovereign states system (so as to understand why it prevailed over other forms and how future challenges might be able to contest it anew), a theory of IL must give up on the primacy of commodity exchange and the analogy between the bourgeois individual and state. It must start instead with historical specificity and the assumption that the international legal form, i.e. the capitalist state, has to be taken for what it is, i.e. merely the institutional appearance of the legitimacy of dominant class interests. Such an approach can help to answer Knox's question of whether legal argument can challenge its own conditions. Historical materialism needs to start from the 'real' relations between human beings and things, not their appearances. Crucially, these relations cannot be attributed to states on the basis that through modernity, states become abstract institutions in the same way as individuals become abstract bearers of rights. In sum, relations between individuals must remain the primary basis of analysis for international legal relations.

Still, theorising the emergence and development of IL through a PM approach remains to be explicitly set out. In addition, the PM history of capitalism becomes in turn problematised by the introduction of a more complex juridical and ideological dynamic to capital accumulation. Significant first steps towards this task, discussed below, have at least been undertaken.

Retrieving Agency in IL

Bachand & Lapointe (2010) provide an alternative to the first critique levelled against Miéville, i.e. the objectification of legal relations and the exclusion of discursive practices. Building on PM's historical and theoretical premises, they introduce an alternative analytical framework of the mechanisms of 'international life'. If IR and IL are mutually constitutive⁷⁸, IL can nevertheless be broken down into three levels. First, they define the legal form as the values, institutions and fundamental concepts of the legal order. At this level, the legal is constitutive of the political and vice versa, which excludes a conception of either domain as

⁷⁸ This interdependence is to be differentiated from Slaughter *et al.*'s assumptions. While they acquiesce to a convergence of the relationship between law and politics, they remain deeply critical, empirically and normatively, of the basis and implications of mainstream 'problem-solving' approaches with which Slaughter is associated.

autonomous. In other words, the values, institutions and fundamental concepts of the legal order determine the behaviour of political elites, while the power relations between elites in turn shape these attributes of the legal form. Hence, Bachand & Lapointe adopt a much broader definition of the legal form that overlaps with that of the political domain. In short, similar and/or interconnected actors essentially constitute both domains (which begs the question of the history and role of their separation).

The second and third levels consist respectively in the *limitations* and *possibilities* arising out of the legal form. The second level of 'legal constraint' refers to norms and rules generally, while the third level of 'law as argumentative practice and legitimizing discourse' emphasises the transformative potential of discursive practices. This potential is crucial for the latter's capacity to alter the conditions of the legal form. Bachand & Lapointe hereby incorporate agency into the mechanisms of IL. Without such agency, changes in content (i.e. constraints, or rules and norms) could not be anything more than just visible. In other words, they could not substantially affect the values, institutions and principles of the legal form, which in turn reconstitute the form of relations in the political domain. For example, the authors note that the development of human rights has been disappointing in the face of the structural effects of capitalism, precisely because they have not been accompanied by discursive practices sufficiently critical so as to correspondingly alter the structural dimensions of the legal form.

Building on the previous argument on the need to uncover the social relations behind the apparent tension between form and content, Bachand & Lapointe describe an important aspect of the relations between the state and its citizens. These inform the norm-creation aspect of the legal form, and thus offer the basis of an alternative to Pashukanis's problematic analogy:

"Here the point of analytical interest is the imbalance between the actors involved in the decision-making process and those who will be subjected to the de facto consequences of the legal (and political) repercussions of delinquent state conduct. Concretely the point is to underline the fact that states' decisions are taken in accordance with the existing power relations between the different groups constituting a given society." (2010: 275)

In schematic terms, dominant groups take or influence decisions that affect the state's population and territory. However, these decisions are assimilated as the 'will' of the state, or the rule of law (*l'Etat de Droit*). They are legitimised through the abstract institutions of the state (themselves sanctioned by the supreme legitimacy of the separation of executive, legislative and judiciary powers). Hence, this hierarchy *a priori* annuls or disregards the power relations that structure the decision-making process. This condition is essential to

upholding the state's *raison d'être* as a neutral and transhistorical symbol of law and order. In response, social groups engage in different struggles (legal, political, ideological) so as to tamper, counter or absorb the effects of the dominant classes' influence filtered through the rule of law. For Marxists, turning the analysis of this process on its head (i.e. starting from the class relations at the origins of decision-making) reveals the dependence of the process of state formation and norm-creation on those relations. In this sense the state as legal form or rule of law⁷⁹, and therefore also the state as only legitimate actor in IL, abstracts or filters the power differentials that operate *within* its legal sphere. Consequently, the point here of Marxist critique is to make these internal power relations reappear to show the real determinants of international legal personality.

Bachand & Lapointe's tripartite analysis and focus on internal social relations is attractive as it provides a heterogeneous and interdependent conception of law, state and social struggle, opening space theoretically for a more diverse account of international legal relations. Still, what of the abstraction of power differentials *outside* the state's legal sphere? In other words, can internal power relations or the class dynamics of a given society explain the state's reach for extraterritorial jurisdiction, and more specifically, the various strategies of juridical expansion since the early modern era?

Locating the Politics of Extraterritoriality: a Method

To account for political and social aspects of the contemporary rise of extraterritoriality, the previous chapter needed to distinguish this rise from the general ensemble of legal strategies of territorial expansion. Subsequently, this chapter had to provide a methodological framework for an historical investigation of differing cases of state formation, legal strategies and the construction of international legal orders. Having discarded the commodity form theory of law for a more dynamic and specificity-driven approach based in PM, this framework still needs to be defined in relation to extraterritoriality. Finally, how this question and research is relevant to contemporary practices must also be discussed.

Legal strategies of expansion refer to the use of legal argument or legal institutions to legitimise political and economic practices occurring outside the jurisdictional reach of the acting state or other sovereign entity⁸⁰. As such, these strategies logically form an integral part of imperialism. However, the ways in which they have shaped (and been shaped by) colonisation are multiple and variable, 19th century extraterritoriality being only one particular instance. The hypothesis explored here is that understanding these processes requires

⁷⁹ "the main actor in IR (the state) is, above all, a legal creation" (Bachand & Lapointe, 2010: 274).

⁸⁰ This distinction is important in light of the role of mercantile companies, but also individuals (*conquistadores*, settlers, administrators, clergymen) whom were accorded political and/or economic sovereign rights, and could therefore engage in juridical practices to an extent comparable to states during the early modern era.

revisiting the notions of primitive and (geo)political accumulation. These notions help to make sense of the interplay between capitalist and non-capitalist processes of exploitation, by accounting for their different social causes and implications.

Three questions will structure the following sub-sections. Firstly, could the concept of 'jurisdictional accumulation' fill a gap in existing analyses, i.e. can it account for processes that are identifiable as neither political nor primitive accumulation and which consist primarily in the extension of jurisdiction? Secondly, how in practice is one to analyse early modern state formation and juridical expansion so as to identify instances of jurisdictional accumulation? Finally, and more tentatively, can this concept account for 21st century anti-capitalist and anti-colonial contestation?

Jurisdictional Accumulation

Marx's discussion of 'so-called primitive accumulation', which closes the first volume of *Capital* (1976), is foremost a critique of classical political economy, and specifically of Adam Smith's mythical treatment of the concept of 'previous accumulation' (Perelman, 2000). For Marx, capitalist accumulation in the very least 'excludes every diminution in the degree of exploitation' (*in* Wood, 1995: 41). Thus, what differentiates capitalist from previous types of accumulation (political, geopolitical, asymmetric⁸¹) is the 'systematic and continuous' (Wood, 1995: 42) necessity for capitalist production. This type of production is conditioned by the 'freeing' of labour from its ties to agricultural land; only then can labour sell itself and generate the propensity to produce surplus value, by allowing more flexibility in the costs of production. What characterises primitive accumulation is the coercive process of separating direct producers from their means of production, led by class struggle and backed by state intervention. Generally, Marxists agree that the system of enclosures in 16th to 17th century England was the first significant manifestation of the process of primitive accumulation. Beyond this, precisely when and where primitive accumulation occurs remains at issue.

If PM has had a particular influence on distinguishing types of accumulation to showcase the different transitional processes of feudal, dynastic and capitalist expansion, this influence can be compared to Marxist work on the contemporaneity of the topic (Midnight Notes, 1990; Perelman, 2000; Mezzadra, 2011; Bush, Bujra & Littlejohn, 2011; Neocleous, 2012). For the last author, this focus is speared on by TWAIL's Post-colonial emphasis on

⁸¹ 'Political accumulation' drove feudal society and reveals its 'culture of war'. "Whereas peasant reproduction as a rule generated economic stagnation, the class of lords was under pressure to build up military power." These different 'fortunes of reproduction', however, remained 'dialectically mediated', a condition expressed by the concept of political accumulation (Teschke, 2003: 61). 'Geopolitical accumulation' emphasises the inter-lordly competition for political accumulation. It took many forms during the Middle Ages ('imperial, individualized, royal') but remained tied to expanding the unit of the lordship (*ibid*: 95-115). It then defined the behaviour of pre-capitalist ruling classes of early modern dynastic and absolutist states (*ibid*: 151-196). 'Asymmetric accumulation' is characteristic of mercantilism as the mere 'redistribution of existing surpluses' (*ibid*: 207-8).

colonisation and imperialism, an emphasis that, as he regrets, is in denial of the relevancy of Marx's analysis of primitive accumulation. If for Mezzadra the prehistory of capitalism is a permanent feature of its history, for Neocleous this prehistory also manifests itself as IL. This implies that capitalism and IL are not chronologically linear processes. This argument is consistent to a certain extent with PM, since if the latter focuses on the *spatial* heterogeneity of capitalist expansion⁸², the former highlights its *temporal* disjuncture⁸³.

The present research aims to develop these claims by looking at the legal institutions and legal relations exported to Spanish, French and British colonies. These constitute each state's attempts at juridical expansion and need to be compared to 19th century extraterritoriality. *The point is to emphasise the spatial and temporal heterogeneity of legal strategies of expansion as a permanent feature of international social change.*

However, the following problem ensues. On the one hand, primitive accumulation signifies a coercive process of land-appropriation that transforms relations of production between individuals. The balance of class forces becomes one between capitalists and labourers, and later on with the onset of industrialism, between capitalists and proletariat. On the other, geopolitical accumulation is a coercive process of land-appropriation that maintains or crystallises relations of dependence between interdependent class forces, such as between lords and peasants, and lords and vassals. In other words, the two processes have very distinct implications. Can they account for the plurality of legal strategies of expansion, particularly variable during the early modern period, rich in different types of social transitions?⁸⁴

In short, existing concepts of accumulation fail to account for the specificity and agency of juridical expansion. They do not allow for specific juridical processes that have political and economic consequences and which are driven by actors juggling with absolutist and mercantilist interests. During the long process of transition and political expansion from the 16th to the late 18th centuries, these processes played a crucial role, one that has not been sufficiently acknowledged. If geopolitical accumulation has been used to refer to Spanish and French legal strategies of expansion, predominantly by Teschke (2003), this thesis argues that this concept misses the constitutive role of the latter for state formation, and thus the enduring role of jurisdictional conditions of accumulation for social and political processes.

Moreover, jurisdictional accumulation can be used to discuss the universalisation of the institutions concomitant to commodity exchange or commodity capitalism, or in other words,

⁸² For Lacher, this consists in "the changing spatialization strategies of states, classes and firms, which structure historical epochs" (2006: 119).

⁸³ Moreover, this focus on primitive accumulation is relevant to this study since it puts the spotlight on the system of enclosures in England as a model for international legal practices.

⁸⁴ For example, these concepts leave a gap for understanding coercive processes of land-appropriation (either by extending the jurisdictional reach of states or by exporting political and legal institutions) which change the balance or institutional setting of class forces *without* transforming the relations of production to a system of capitalist social relations.

the universalisation of Miéville's 'legal form'. However problematic, Miéville's narrative forces PM to reassess the role of legal strategies in the expansion of territorial sovereignty. Specifically, this reassessment offers to explain why, if capitalism originated in early modern England, it nevertheless was able to expand so rapidly and universally. Crucially, it further explains how capitalist relations of production were able to adapt to a variety of existing institutions, and how the British expansion of capitalism was shaped by the confrontation between strategies of capitalist accumulation and continental strategies of jurisdictional accumulation (in this case, dynastic forms of territorial expansion). Thus, the hidden history of juridical expansion calls for the concept of jurisdictional accumulation to account for contested processes of territorial expansion that constitute an essential part of the discursive legacy of 'Westphalian' state institutions.

The following will lay out analytical starting points from which to identify these different instances of jurisdictional accumulation in the thesis' historical case studies.

Analytical foci

This section proposes a four dimensional analytical grid to refine the preliminary framework of analysis proposed in the Introduction (actors, orders and strategies). First, 'geopolitical orders and dialectical dichotomies' consist in the construction of international legal orders through the relations between dichotomies such as law and politics, *dominium* and *imperium*, private property and public sovereignty. Second, legal institutions refer to states, laws and corporations as sites for the crystallisation of contested property relations. Third, legal social classes are composed of the relations between individuals and groups of individuals as social struggles over property relations. Finally, the fourth angle consists of legal and political thought, as the intellectual struggles and contested discursive practices over property relations. These constitute the analytical entry-points to theorise the different processes of juridical expansion. In other words, they constitute a map of social relations that will reveal, through the comparison of the cases undertaken, the differences between strategies of (geo)political, primitive and jurisdictional accumulation.

Geopolitical Orders and Dialectical Dichotomies

"This would mean analysing the play of legal dichotomies, too, not in terms of an abstract logic of concepts but as a series of articulations of positions in concrete, historically situated political struggles. (...) The irreducibly *political* character of law would not then cancel out law's legal character. It would merely point to the inevitable moment of choice in legal practice in favour of one contested meaning against another. (...)

The point is not whether this particular history [example of shift from hunter-gatherers to private property through common ownership] is correct but that it provides one example of how conceptual oppositions express the dialectics of social struggle.” (Koskenniemi, 2008: 45)

Although this passage on Marx’s potential contribution for international lawyers stems from a CLS approach, it contains the essential methodological notions of heterogeneity, dialectics, contested social relations and interdependence between law and politics. Mainly, it is useful as a reminder of the particularly important role of legal dichotomies in the indeterminate discourse and practice of IL (Koskenniemi, 2005). To render the ‘international’ dimension of juridical expansion, positing *a priori* the existence of a separate supranational sphere as an overarching structure would merely be repeating the mistakes of the literatures this thesis is trying to overcome. Namely, the point is to avoid Neoliberal Institutionalism’s use of globalisation and, in the case of the commodity form theory of IL and other critical approaches, the reliance on mercantilism and imperialism. Instead, the goal is to understand IL, or more precisely ‘inter-societal legal relations’, as a constant interplay between ‘legal dichotomies’ of international order and ‘concrete, historically situated political struggles’. Moreover, to accentuate the fact that the arguments deployed here are grounded in a historical materialist approach, the notion of ‘dialectical dichotomies’ will be used. Therefore, dialectical dichotomies need to be historicized in relation to geopolitical orders, as concrete institutional frameworks for social relations but also as reifications of those relations⁸⁵.

In effect, using this angle will involve the differentiated assessment of early modern political and legal regimes. If PM has focused on the differences between France and England and their varied path out of feudalism, how does this compare to 16th century Spain? Considering the latter’s legacy for IL (e.g. Grisel, 1976) what is the particular role, if any, of the strategies of juridical expansion used by the Spanish empire? Such a question needs to be posed for each hegemonic European state, Spain, France and England-Britain. These three states were selected, firstly, because they each constitute innovative and far-reaching examples of the combination of geopolitical orders and dialectical dichotomies. In addition, structuring the following chapters according to each case echoes Grewe’s (2000) periodisation of IL. However, this echo is purposely distorted by a focus on internally contested social relations, and thus contributes to debunking that and other linear and state-centric histories of IL.

⁸⁵ Bachand & Lapointe make the following useful cautionary remarks: “[E]xcept in a context of social revolution, changes in the legal form cannot be attributed to the deliberate and pre-determined will of dominant groups and it is only with hindsight that we may recognize that change has been the result of incremental shifts in old legal orders and in old forms of socially organized normativity which has transpired within a context of social transformation and of long-standing struggles (Conninell, 2000; Thompson, 1975).” (2010: 274) This also relates to Brenner’s essential argument on the role of ‘unintended consequences’ (1997).

Social Property Relations: Legal Institutions and Social Classes

Legal institutions and legal social classes⁸⁶ are two angles that both derive from PM's focus on (internally and externally) constituted and contested social property relations. If the legal institutions consist of public and private bodies – such as administrations, courts, parliaments, councils, trading companies and states, – then legal social classes are composed of the individuals (lawyers, parliamentarians, *conquistadores*, settlers, missionaries, intellectuals, etc.) and groups (classes, professions, corporations, guilds) directly concerned by the shaping of the former institutions. The problem of class and law in Marxist theory is classically framed around the emergence of the bourgeois class requiring bourgeois rights; the legal class is thereby mapped on the model of the rise of the bourgeoisie. However, revisionist historiography forces us to reframe this problem from the perspective of more localised institutional contexts. Specifically, it implies retracing the differing emergence, formation and impact of lawyers concerned with the construction of sovereignty at home and abroad, across the geographical and chronological framework of each case study.

For example, chapter four relates how a legal profession evolved in France according to the *Ancien Régime* but then adapted to the external pressure of capitalist imperatives. Moreover, how does the collaborative role of this professional legal body (Beik, 2005) compare to England's powerful legal nomenclature (Sugarman, 1986), and how do both compare to the formation of legal institutions in their respective colonies (Benton, 2010)? Answering these questions provides a more explicit analysis of legal social classes from the period in question, so as to clarify PM's reliance on the juridical aspect of social property relations, while explicating social aspects of the history of IL generally ignored.

Legal and Political Thought

The fourth angle of analysis is the role of legal and political thought. This can be read as a manifestation of Bachand & Lapointe's dimension of 'law as argumentative practice and legitimizing discourse'. As they conclude:

"it is apparent that the role the law plays in relation to the international legal order is largely determined by intellectual struggles. These struggles have the power to alter ideological formation and, notably, the space of ideological legitimacy which subsequently influences how we interpret the law and which legal arguments will be viewed as legitimate or acceptable, and ultimately win the day." (2010: 283).

⁸⁶ The term class refers to classical Marxist categories (capitalist, bourgeois, proletarian, agrarian), as comparative terms from which to discuss the pertinence of the idea of a legal class. Unfortunately, the question of whether a 'legal class' can be identified goes beyond the limits of this chapter. Thus, the historical cases will be limited to highlighting the legal aspects of pre-determined social classes and professions.

Moreover, any analysis of early modern legal theory has to bear in mind that no legal theory as *such* existed before the end of the Middle Ages. Furthermore, it remains inseparable from political thought up until the 20th century:

“In order to present the legal thought of early Europe, one has to reconstruct it by trawling the actual practice of law or state, or the work of men whose main purpose was to theorize not about law, but about society, or ethics, or theology, or politics. Indeed, except perhaps for the pages on the twentieth century, a lot of the material has as much claim to be ranked under the history of political as of legal thought. But a clean separation of those areas is not possible.” (Kelly, 1992: *xiv*).

Focusing on this angle shows that the endurance for IL of the absolutist nexus of law and politics was due to the influence of France’s ideological and political debates. As these debates promoted a new type of legal body marked by the regime’s specific public/private power relations, (the DPE) they are indicative of the interdependence between the capitalist and pragmatic British ascending model *and* the more conservative continental mode of diplomacy and international legal theory. Going further backwards, the social struggles during the rise of capitalism in England in the 16th and 17th centuries show that emerging capitalist practices, if institutionalised through the courts and political philosophy, were also resisted by an existing language of rights (Thompson, 1975; Wood & Wood, 1997; Stammers, 2009).

Therefore, an understanding of how political and legal scholars, writers and politicians understood legality and its evolving role in terms of private property and public sovereignty is essential to the history of legal strategies of expansion. Crucially, it will provide an invaluable insight into the difference between British-led 19th century extraterritoriality (and its origins in the earlier system of enclosures, i.e. primitive accumulation) and Spanish and French-led jurisdictional accumulation. It will also help to note the more subtle differences between the latter concept and instances of (geo)political accumulation.

Before concluding this chapter, this section will end by reflecting on why, beyond historiographical factuality, this added categorisation between types of accumulation is worth adopting. What can the disciplines gain from it in terms of the contemporary rise of extraterritoriality and judicial globalisation?

Jurisdictional Struggles

“All social change is conceived of as coming-to-be of what potentially is, as the further unfolding of an already existing process, and hence discoverable by a study of this process taken as a spatio-temporal Relation.” (Ollman, 2003: 28)

For Miéville, struggles for the improvement of working conditions or political emancipation are flawed if articulated through the legal form, as long as it remains embedded with commodification, coercion and wage-labour. This is particularly so for IL, where the international legal form maintains the necessity of the lack of supra-national authority through the ‘founding’ principle of equal sovereignty. However problematic, the commodity form theory does pose the question as to how one is to recapture the ‘coming-to-be of what potentially is’, or in Knox’s words, whether legal argument can be ‘used to abolish its own conditions’.

Hence, how does one formulate or use legality, in the sense of acquiring something necessary for the political survival of a community or the improvement of its living conditions, without reproducing the coercion and inequality of hegemonic international legal forms? Proponents of judicial globalisation must face up to this condition of capitalist accumulation. But how does it affect other types of claims to jurisdiction or juridical legitimacy?

The problem of self-determination and the ideological and practical struggles at its basis are an example of such claims. Specifically, it constitutes an attempt at recapturing or reformulating jurisdiction, as a claim to power over territory and peoples, by non-dominant or exploited individuals contesting the origins or conditions of legitimacy of existing jurisdiction. As such, its goal is not to implement principles of IL or human rights for their own sake (i.e. merely their form), as the liberal credo would justify, but to instrumentalise them through a form of ‘principled opportunism’, as Knox (2011) proposes. This process could apply to struggles occurring in Western societies, such as the example of the Occupy movement (noted in the previous chapter as an alternative political form of extraterritoriality), but also in contexts of neo-colonialism and occupations, such as the Palestinian resistance (Strawson, 2009).

Finally, the social movements and campaigns surrounding the application of the SOPA and PIPA acts, and the implementation of the ACTA treaty also illustrate different forms and concepts of jurisdictional struggles. A discussion of these will be returned to in the conclusion of the thesis.

Conclusion

This chapter maps out conceptually how the present thesis contributes a history of juridical expansion as a historical materialist approach to IL and IR.

The structural analysis of international society, regulated by a capitalist system of unequal power relations but formally equal states, is accepted conventionally as a founding Marxist assumption of the critique of IL. Intrinsic to the commodity form theory of IL, it however poses historical and theoretical problems for accounts that seek to map out and theorise international social change. In effect, a structural analysis tends to accept as given the separation between the international and domestic respectively as an outside and an inside, and it anachronistically reifies a bourgeois state form as the unit of both geopolitical and capitalist accumulation.

The challenge to the commodity form theory of law is backed up historically by differentiated European and colonial contexts and their varied experiences of extraterritoriality, the parallel richness of political and legal debates, and the overlapping of contending legal processes of accumulation by inter-imperial rivalry and compromise. Adopting a PM approach helps to understand the class specificities of each dominant state in the evolutionary phases of early modern public IL, without adopting a linear and homogeneous developmental trajectory or a static concept of the state and world order. Specifically, the differing trajectories of Spain, France and England/Britain and their contrasting imperial policies can help explain the interplay between strategies of (geo)political, primitive and jurisdictional accumulation. This accumulation of jurisdiction refers to different types of processes of institutionalisation and land-appropriation that are not adequately conveyed, if at all, by the concepts of primitive and (geo)political accumulation.

Thus, this research program historically disputes the status quo of the structural relations between IL and capitalism, and proclaims the necessity to address international legal relations in terms of class, institutions, discourse and geopolitics. The following historical analyses of Spain, France and Britain are indirectly streamed through the four analytical foci proposed in the last section, rather than explicitly structured by them. This allows for an account of the different debates that flows from the actual practices and existing narratives, but also for the fact that each case uniquely and differentially combines aspects of each theoretical angle. It was therefore deemed contradictory to the overall argument to structure these analyses by an *a priori* succession of these categories. Still, if not explicitly present, these methodological foci remain at the basis of the actual historical research. As a result of this, finally, the concept of judicial globalisation can be socially deconstructed from the ahistorical and politically exclusionary influence of Neoliberal Institutional assumptions.

CHAPTER 3 – SPAIN, THE CONQUISTA AND THE DOCTRINE OF JURISDICTIONAL ACCUMULATION

The next three chapters develop historical narratives of legal strategies of expansion. Their aim is to provide conceptual and practical material to build a history of juridical expansion. Based on spatial and temporal heterogeneity, this history is meant to establish a more solid ground for a critique of contemporary extraterritoriality and judicial globalisation. The next two cases respectively look at how the Hispanic and French monarchies, from the 16th to the 18th centuries, developed and adapted to geopolitically contending legal strategies. In Spain's case, these strategies consisted in doctrine and practices of jurisdictional accumulation, and resulted in restricting *ius gentium*, the medieval law of nations, to new colonial concepts of ownership (forms of *dominium*) and new practices of 'socially organic' exploitation. In effect, Spain's influence in the history of IL should be revisited as principally developing rights to wars of discovery and reconstructing European-type property rights for colonised Native Americans. If these processes do constitute a break from past strategies of geopolitical accumulation, this does not reversely mean they are the first steps of the modern or capitalist system of IL.

Yet, for most scholars of IL, the discipline has its "primitive origins [in] the works of Francisco de Vitoria" (Anghie, 2005: 13). Early modern Spain is credited with marking 'the beginnings of International Law and general Public Law doctrine' (Grisel, 1976; Nussbaum, 1954; Shaw, 2008). According to this narrative, monarchical absolutism and the discovery of the 'New World', held together by state centralisation and legal doctrine, led to the contemporary system of sovereign states and universal IL. Other studies, however, remain more mindful of the medieval character of 16th century Spain (Hamilton, 1963: 4-5; Pagden & Lawrance, 1991). Incorporating the work of the three other major protagonists of Spain's 'intellectual elite'⁸⁷, Soto, Molina and Suárez, Hamilton writes: "It would be absurd to credit any of these writers with being the 'founders' of IL, or even with having any clear notion of it in the modern sense." (*ibid*: 98). Such historians of political thought, along with historians of Spanish institutions (Elliott, 1963; Anderson, 1974; Owens, 2005) question overly abstracted, linear and progressive readings of political history and are generally more prudent in making long-term transitional links.

This prudence has been more thoroughly articulated by a series of critical studies in the history of political thought, but also in IL⁸⁸. These draw on the argument that scholars have a tendency to interpret the early modern classics in a way that reifies specific historical and

⁸⁷ This intellectual elite is referred to as the neo-Scholastic school, or the School of Salamanca, and consists principally of Francisco de Vitoria (1485-1546), Domingo de Soto (1494-1560), Luis de Molina (1535-1600) and Francisco Suárez (1548-1617).

⁸⁸ See chapter one for a review of this literature.

disciplinary trajectories (Pagden, 1987; Bartelson, 1995; Tuck, 1999; Jahn, 2000). In this vein, critical IL scholars argue that Vitoria's concept of sovereignty was "subjective and medieval" (Miéville, 2005: 187), that his work could not fathom the possibility of a world of equally sovereign states because he was not concerned with the problem of order among them (Anghie, 2005: 15). Instead, they focus on the role of colonialism as a social and political process defining the course of modern IL.

The methodological framework adopted here aims to develop the work of critical international lawyers. It consists in applying the following PM argument: "Property relations not only explain the constitution of different political regimes and geopolitical systems, they also generate the historically bounded and antagonistic strategies of action that govern international relations." (Teschke, 2003: 217). Accordingly, this chapter explores how early modern property relations shaped international legal thought and practices. The legacy thereby recaptured is distinct from that of classical and critical interpretations. The following quote from Sir Thomas More's (1478-1535) *Utopia*, popular among *conquistadores*, signals the important change that occurred in strategies of geopolitical accumulation:

"[T]he most just cause for war was 'when any people holdeth a piece of ground void and vacant for no good and profitable use, keeping others from the use and possession of it which notwithstanding by the law of nature ought thereof to be nourished and relieved.' (More in Dickason, 1989: 234)

Or, in other words:

"Type of use as a criterion for rights of occupation was a development of the Age of Discovery; one looks in vain in medieval jurisprudence for such an approach." (Dickason, 1989: 234)

Extrapolating Dickason's argument, this chapter argues that the Spanish era developed strategies of jurisdictional accumulation as a novel way of justifying territorial expansion and exploitation. As 'un-governed' practices and 'un-used' lands required new laws and new rights, new theories and arguments were deployed for the Age of Discovery. This resulted in legitimising, through various articulations of *dominium* and their gradual differentiation from feudal and regional forms of sovereignty, the use of power over rights and their standardisation and imposition over existing customary or tribal forms of ownership present in Native American societies.

The first section relates historiographical debates on the role of Spain in the history of IL and questions their two central themes as explanations for the shift from *ius gentium* to *ius inter gentes*, i.e. the Spanish conquests and legal doctrine. Such explanations appear unable

to grasp the specificities of this shift. Instead, the section proposes a PM approach to develop the critical history of IL. Specifically for the task of socialising the history of extraterritoriality, this chapter asks what types of processes of juridical expansion Spain developed and whether these can be defined as jurisdictional accumulation. Moreover, it explores whether this concept can help better explain or provide an alternative account of the shift from *ius gentium* to *ius inter gentes*.

To answer these questions, the second section will show, from an analysis of early modern Spanish property relations and state formation, that Spanish imperialism did not lead to changes in relations of production, and therefore did not constitute processes of primitive accumulation. The absence of an urban bourgeoisie, the dependence of the rural population on the aristocracy, the latter's unusual alliance with the Crown, and finally their failure to redistribute the riches gained from territorial acquisitions and plunder so as to develop agriculture or industry left the Spanish economy to stagnate. Nonetheless, the age of discovery did develop new forms of geopolitical accumulation.

The third section explores the geopolitical conditions for the development of these new processes, identified as jurisdictional accumulation. After presenting the major political forces of the 16th century, it then focuses on two distinct but related shifts that provided the impetus for developing different types of accumulation. These consisted, firstly, of the shift of power from the papacy to the Habsburg dynasty, and secondly, of the shift from crusades to discoveries modelled on the move from the *Reconquista* to the *Conquista*.

The fourth section will, finally, examine the actual processes of jurisdictional accumulation and their implications. These are located through the property relations and colonial practices implemented in the Americas, but also in the debates over the legitimization of the wars of conquests and rights of discovery. The chapter thus returns to the problem posed in the first section to contribute to existing critical studies of the period. Namely, that Spain's role in shaping a new international legal order and its influence on subsequent scholars should be accounted for as a doctrinal legitimating of practices of jurisdictional accumulation.

The Origins of IL between Empire and Doctrine

This section investigates two grand themes of the historiography on early modern Spain and IL, the Spanish conquests and neo-Scholastic doctrine. It argues that both fail to satisfactorily link social, geopolitical and doctrinal factors to explain the role of Spain in the history of IL. It concludes that a social property relations approach can help to explain the

shift from *ius gentium* to *ius inter gentes*, notably by focusing on practices of juridical expansion.

The Classic Imperial Road to Modernity

For Grewe (2000), the 'Spanish Age' (1494-1648) marks the development of '*ius inter gentes*', a more restricted form of '*ius gentium*' tailored to the Christian family of nations. Grewe focuses on three factors, two of which are the European Christian community and its strong Catholic influence on the doctrine developed by Vitoria, Soto, Las Casas and Suárez. The third central factor is the conquests, which provided the urgent political need for a conceptualisation of an extra-European legal order. Grewe emphasises how the conquests put pressure on the great powers to legally demarcate different legal regimes applying to Europe and to the rest of the world, i.e. 'overseas'. This follows from Schmitt's work on the constitutive role of amity lines, where "everything that occurred beyond the line remained outside the legal, moral and political values recognized on this side of the line" (Schmitt, 2003: 94). The conquests also put more pressure on nations to demarcate themselves from each other, as the colonial market opened new horizons and possibilities of profit, key to their growing quest for power. The Spanish Age also saw the development of the early modern absolutist state as the concentration of political power over a conglomerate of lordships into the hands of one monarch. Consequently, the emerging modern law of nations was to be a reflection of the general move towards state sovereignty, rationalism and individualism.

Grewe's account is a rich and reliable historical source, but his focus on the political power of each hegemon, i.e. Spain, France and England as determining the course of modern IL, is problematic. This chronological interdependence results in each power being defined in relation to its failure or progress over the other. As such it focuses on the similarities between each state so as to construct a more homogeneous and linear account of the history of IL, which hides the social property relations that constituted the formation of each state. Specifically, it ignores the social struggles that are played out in determining the hegemony of each state, and the implications of these contested differences of property relations for how we conceive of IL and politics. The consequences of this historiography can be seen today, as it leads to understanding contemporary extraterritoriality as merely the expression of American hegemony. Although this hegemony is an undeniable aspect of the recent phenomenon of judicial globalisation, its role as central explanatory factor perpetuates a Realist understanding of power politics. As a transhistorical feature of international legal relations, such a conception of hegemony maintains these relations as secondary order phenomena.

Similarly, Schmitt (2003: 82) emphasises how Vitoria's theory of just war was 'provoked' by the conquests, as state practices constituting a new spatial order of IL. In this way, he puts the spotlight on how land-appropriation, understood as the "process of order and orientation that is based on firm land and establishes law" (2003: 81), can be a constitutive process of IL. Schmitt's argument could thus be interpreted as pointing to the importance of property relations in determining spatial and temporal changes in the development of IL. If the land-appropriation of a new world during the Age of Discovery signifies a new *nomos*, i.e. a new spatially determined order for the making and understanding of IL, in this case the *jus publicum europaeum*, then the property relations claimed and fought for resulting of that land-appropriation are the constitutive processes of that order. They can better explain how modern IL differed from feudal or absolutist legal systems.

Crucially, though, Schmitt differentiates between what is constitutive ('*le pouvoir constituant*') and what is constituted ('*le pouvoir constitué*'), and criticises jurists of positive law for rejecting "as unjuridical the question of what processes establish this order" (2003: 82), i.e. they do not concern themselves with the constitutive. Schmitt argues that this is 'rational in practice', as "modern legality, above all, is the functional mode of a state bureaucracy, which has no interest in the right of its origin, but only in the law of its own functioning" (*ibid*). However, this leads to a problematic theoretical circularity in modernity, found across the social sciences, as legal positivism fails to explain or even highlight the deeper structural processes and conflicts that constitute and reproduce the modern order. Thus, Schmitt's history of IL is foremost a ground for his theoretical critique of positivist modernity and liberal universalism. Consequently, his search for the origins of those orders as critique distorts his analysis of property relations, and his account remains too politicised by his desire to eradicate their strengths and return to his preferred mode of 'land-appropriation', the *Landnahme* of the *jus publicum europaeum*, darkly associated with the early 20th century concept of *Grossraum*, i.e. German military expansion (Koskenniemi, 2000; Teschke, 2011a; 2011b; 2011c).

Legality and the Neo-Scholastic Doctrine

The second important focus developed by historiography in IL and early modern Spain is neo-Scholastic doctrine. However, the influence of this doctrine cannot be understood separately from the Castilian Crown's relationship to law, as a moral code of conduct and as an institutional system for the formulation of policy.⁸⁹ This relationship operated on three

⁸⁹ The following section develops this analysis in more detail, but it is briefly summarised in this section so as to emphasise its importance for understanding neo-Scholastic doctrine. For a recent and detailed account of the

levels: the political, geopolitical and doctrinal. Politically, the Crown's policy was legally advised and officiated, as is shown by the efforts after the unification of Castile and Aragon in 1492 to organise and administer the kingdom as a whole. Notably, the kingdom established the primacy of civil law while retaining affinities with the canon law of the religious order.

Geopolitically, the new kingdom used legislation to justify its overseas adventures. It did so by requesting donations and bulls from the papacy acknowledging Spain's rights of discovery, while playing its strong military position to influence and pressure other actors such as Portugal in the writing of treaties. Moreover, the organisation of the Empire was legally complex: its "colonial government heavily relied upon judicial devices and procedures, and on legally trained officials" (Parry, 1990: 192).

At the doctrinal level, the Spanish Crown sought council from theologians and jurists to determine its rights and duties overseas and resolve growing social and political problems arising from the conquests. Next to the influence of Vitoria, the official debate between Las Casas and Sepúlveda, commissioned by the Crown and judged by a board of jurists and theologians, played a significant role (Hanke, 1974). The function of ecclesiastics in the colonies as protectors of the Indians is also crucial for their help in spreading European ideas.

More specifically, four characteristics can now be attributed to the doctrinal shifts of this period. First of all, the Age of Discovery diverted the theological course taken during the Middle Ages. As humanism took over legal thought in the 17th century⁹⁰ influenced by the needs of commerce and trade, theological and political debates moved towards issues of the freedom of the seas and rights of discovery and merchants. Dickason claims that Spanish colonisation "challenged and even contradicted concepts in legal thinking that had been evolving since the twelfth century." (1989: 143). If humanism shaped ideas about the secularisation of sovereignty, this shift did not favour universal justice and the rights of any man, and least of all of course, any woman: "Instead it reinforced the perception of Amerindians as savages living outside of society." (*ibid*: 227).

Second, a new spatial context was provided, as new 'global lines' were drawn to divide the world during the treaties of Saragossa in 1526 (*raya* between Spain and Portugal) and

juridical character of Spanish early modern society, see Owens (2005): "judicial procedures do not just provide a frame for the story. In an important respect, they are the story... many among the political leadership of the Castilian commonwealth had become familiar with ideas developed by jurists about the relationship of rights based in natural law to the proper exercise of monarchical authority. These ideas, therefore, played a significant role in political arenas beyond the courtroom." (*ibid*: 10)

⁹⁰ Humanism is a tradition of thought mostly associated with the Renaissance and its revival of the work of the Roman Cicero (106-43 BC), who favoured an oratorical style of politics. Humanism replaced God with man as the centre of argumentation, but it remained attached to deriving the general laws of the universe from God. It is contrasted to natural law theories derived from Plato and Aristotle, and specifically in the case of the neo-Scholastics, from St Thomas Aquinas (1224-1274). Humanism therefore could be seen as an attempt to distance itself from the theological nature of the Spanish school.

the treaty of Cateau-Cambrésis in 1559 establishing amity lines between France and Spain (Schmitt, 2003: 87).

Third, the transitional aspect of the period should be noted, as shown by the confusion and inconsistency of Spanish scholars. As Wood notes: “it is testimony to the remarkable flexibility of this moral discourse that a theology critical of the Spanish Empire in the Americas could be mobilized no less in its defense.” (2003: 40).

Finally, this body of doctrine should be contrasted to that influenced by later Northern Protestantism, and attributed to the ‘fathers’ of IL, Hugo Grotius and Samuel Puffendorf. These scholars have been attributed the task of restricting the term *dominium* to the notion of private property (Pagden, 1990: 16). Spanish natural law scholars, who in contrast had adopted a much wider definition of *dominium* (*ibid*), were radically opposed to the Northern waves of Protestant political thought, and it is clear that Vitoria’s work on natural law was in defence of the Catholic order: “For, in the end, Vitoria and his successors were far less concerned with the particulars of the American case than they were with the opportunities it provided for a refutation of Lutheran and later Calvinist theories of sovereignty.” (Pagden, 1990: 18).

If these aspects can be brought together from different historical studies with fairly little controversy, why and how Spain’s highly ‘legalised’ and ‘legalising’ imperial power was not a product of medieval legal doctrine remains less so. How did the shift from *ius gentium* to *ius inter gentes*, or in other words, the politicisation of medieval legal doctrine through legal means, actually occur?

This paradox is generally ignored, as historiography remains focused on defining this period by reference to its role in shaping modern IL. Nevertheless, critical historiography’s focus on colonial practices to explain shifts in doctrine, and specifically its arguments on the construction of modern sovereignty through the interdependent distinction between coloniser and colonised (e.g. Koskenniemi, 2001; Anghie, 2005; Bowden, 2005; Cavallar, 2008; Kayaoglu, 2010) are essential contributions. Some authors have focused on highlighting the above paradox. For example, although doctrinal and theological work on *ius gentium* was extensive and sophisticated from the 12th century onwards, by trying to resolve the problems posed by the legal status of non-Christian peoples, Dickason (1989: 143-173) shows that Spain’s legal elite departed from this tradition to become politically highly instrumentalised.

This had long lasting consequences. Henry Wheaton, an American jurist and diplomat of the 19th century known as a fervent apologist of empire, defined the colonial practices of European powers over American peoples and their lands as follows: “[it is] a maxim of policy and of law, that the right of the native Indians was subordinate to that of the first Christian discoverer, whose paramount claim excluded that of every other civilized nation, and gradually extinguished that of the natives.” (*ibid*: 143). Thus, not only did the Spanish empire

'transform' the countries it colonised, it also served as a precedent for later arguments of legal superiority.

To build on these claims, a PM approach hones in on the social structures and property relations developing in *both* the Hispanic kingdoms *and* its overseas territories. The geopolitics between all these regimes pushed legal doctrine towards justifying the supremacy of intra-European state competition. In other words, the PM approach developed here provides the social, geopolitical and intellectual dimensions necessary to explain the shift from *ius gentium* to *ius inter gentes*. Crucially, as part of this shift, this chapter needs to determine how important legal strategies of expansion were for Castilian imperialists, whether they differed from existing practices of geopolitical accumulation, and what role, if any, they played in formulating or influencing legal doctrine.

The following will show that these practices were very much present and are better understood as strategies of jurisdictional accumulation. The next section retraces the history of Spanish state formation, and questions the apparent contradiction between the demise of Spain's precocious economic and political empire and its interpretation as founder of modern IL. As an explanation to this problem, and more generally to the above paradoxical shift in international legal orders, the two following sections explore more directly the conditions and implications of jurisdictional accumulation.

State Formation and Property Relations 1492 – 1708

The Unification of Fragmented and Varied Kingdoms

The kingdom of Castile (central Spain) counted a population of between five and seven million people; the nobility very largely seized its agrarian property, as two to three per cent of the population controlled ninety-seven per cent of the soil (Anderson, 1974: 62). Soil was mostly attributed to sheep farming, which was connected to the textile industry in Flanders. The aristocracy was strong but it was not part of a fixed or institutionalised Estates system. "Aristocratic corporatism found separate expression in the rich and formidable military orders (...) created by the Crusades"; consequently, it still lacked collective authority (*ibid*: 63).

The Realm of Aragon (the Eastern regions) was comprised of the principalities of Aragon, Catalonia and Valencia. While all displayed particular structural identities, as a whole they differed politically with Castile, a fact with important consequences. "The asymmetry of institutional orders in Castile and Aragon was, in fact, to shape the whole career of the Spanish monarchy henceforward." (*ibid*: 65). Aragon was the most repressive seigneurial system in the Iberian Peninsula. Catalonia was the centre of a mercantile empire with Barcelona, but was ravaged by epidemics, commercial bankruptcies, rebellions from

artisans and peasants, and a civil war between the nobility and the monarchy. Valencia, somewhere halfway between Aragon and Catalonia, was based on nobility exploiting *morisco* labour and a growing merchant economy (*ibid*: 64). Their commonalities lay in their 'sophisticated and entrenched' Estates structure. Each principality had its own *Cortes* (early form of parliament), which decided by unanimity, and institutions with permanent judicial control and economic administration.

The unification of both kingdoms involved a vast program of administrative reorganisation: military orders were dissolved, with their lands and incomes annexed; baronial castles were demolished; private wars were banned; municipal autonomy was broken by *corregidores* (official administration); royal justice was extended and reinforced; local Church revenues were redirected towards the state, so as to be detached from the Papacy; the *Cortes* were 'domesticated' by omission of the clergy and the nobility after 1480 (*ibid*: 65); finally, fiscal yields increased dramatically (from 900 000 *reales* in 1471 to 26 000 000 in 1504, i.e. more than twenty-eight times) (*ibid*: 66).

These measures show the extent of the rationalisation and modernisation of the "Castilian state machine". Concerning the economy, privileges were given to the wool cartel, discriminatory measures were taken against cereal farming, such as fixing the retail price, a guild system was put in place to constrict the urban industry, and religious persecution meant the exodus of Jewish capital (*ibid*: 66). When Charles V came to the throne in 1516, the above pattern was accentuated. In reaction, 1520-21 witnessed the *Comunero* revolt driven by artisan groups in towns and the urban bourgeoisie of north central Castile. This heightened the Crown's chances to secure its goals of unification, and marked the consecration of the golden age of Spanish imperialism. Still, although the country was being centralised, internal and cultural elements made the Spanish state unique and bound to premodernity. Moreover, it should be noted that the realm of Aragon was always determined to fight against centralisation, and total unity was never achieved.

Characteristics of Hispanic Society

Firstly, early modern Hispanic elites and specifically the army of *conquistadores* displayed significant medieval characteristics, in comparison to the rest of Europe. Culturally, they were motivated by a spirit of chivalry and an imagination captured by stories of monsters and heroic adventures as depicted by the popular corresponding literature, and of which Miguel de Cervantes' *Don Quixote* (1615) is a fascinating example (Weckmann, 1969; Owens, 2005: 240-241).

Second, Spanish politics in this period were symbiotic with religious orders. As complementary and mutually enhancing, their relationship was accentuated during the 15th

century, when the Castilian Crown decided to preach religious intolerance to guarantee a stronger state (Hanke, 1974: 5). This marked the motivations behind the *Reconquista* and the take-over of Granada from the Moors, with whom the rest of Spain had more or less well cohabited and traded until then. Politics and religion were not thought of separately. This translated into the weighty presence of the papacy in Spanish politics, although we will see below how this developed in favour of the Spanish Crown. Nevertheless, Spanish '*Raison d'État*' consisted first and foremost in being the guardian of a universal Christendom, and this had very specific and unique consequences for the relationship between state and non-state actors. For one, it limited Spanish 'absolutism' since it remained in theory accountable to God:

"Unlike France and England, Castille had, therefore, no further need to assert its own legitimacy against particular and factional interests. Its principal ideological concern became instead its self-appointed role as the guardian of universal Christendom. In order to safeguard that, it was crucial for the Crown to be seen to act on all occasions in strict accordance with Christian ethico-political principles. The task of the theologians and jurists was to establish just what those principles were. This habit of seeking political legitimation ensured the existence of a lively and by no means uncritical enquiry into the behaviour of the state." (Pagden, 1990: 6)

Thirdly, this form of politico-religious statecraft went hand-in-hand with a respect for morality and law. This aspect is undisputed amongst different historians (Elliott, 1963; Hanke, 1974; Parry, 1990; Pagden, 1990; Owens, 2005). The unification of Spain meant the implementation of a centralised legal system, or more exactly its attempt. As across Europe, communities lived with concurrent legal systems, such as Civil Law, Canon Law, and customs known as *fueros* that granted special liberties. Spain had a civil code, *Siete Partidas*, put in place in 1256-65, and the Civil Law prevailed in 1505 with the Laws of Toro. These were assured by the law schools of Spanish universities and by professional lawyers in Roman jurisprudence (Parry, 1990: 192-193). This domination of Civil Law did not mean that other legislation became void; privileged classes and municipalities still enjoyed special liberties, in Spain as in the Indies, and all codes of law were in theory valid even if conflicting. Spain also produced large collections of royal decrees such as the *Nueva Recopilación de Leyes de España* (1567), and the corresponding *Recopilación de Leyes de Indias* (1681). The King was the head of powerful and numerous judiciaries as well as being the supreme legislator. This was characteristic of feudal authority, and is an important example of the unique character of Spanish absolutism (Parry, 1990: 193; Owens, 2005). Another illustration of the special relationship between authority and legality was the 'school-trained lawyer', as

the King's "most trusted servant" and an "appropriate and willing agent of centralised authoritarian government" (Parry, 1990: 194).

Spain's 'Infirm Absolutism'?

In consequence of the three preceding factors, the attempt at Spanish absolutism failed to transform the state into a unified fiscal and administrative apparatus. Owens argues that Spanish absolutism is more of a myth in the face of the importance of its various judicial administrations and the Castilian monarchy's constant need to collaborate and negotiate its claim to a 'royal absolute authority' with 'local notables' and 'territorial aristocrats'. "However important the sovereign's leadership was for shaping the course of events, no monarch, no Crown administration, no royal Court had the coercive power to structure the kingdom's political life" (Owens, 2005: 7). This did not stop Philip II's attempt to assert, in a famous lawsuit analysed in detail by Owens, the right of rulers 'to act according to their own will' (2005: 15). However, such assertion was nullified without the appropriate support and collaboration of the commonwealth. This paradox of Spanish centralisation, i.e. the way in which its reliance on jurists and on a strong judicial system led to a more restricted, politicised relationship between rulers and law, is essential as a more cautious interpretation of Anderson's analyses focused on below.

The defeat of the *Comunero* revolt in the mid-16th century marked, according to Anderson, the consolidation of Spanish absolutism, while also setting it apart from other European absolutisms where "the primary pattern was the suppression of aristocratic rather than burgher revolts, even where the two were closely mingled." (1974: 68). The *Comunero* revolt was conducted by the third Estate, and was defeated by the royal army with the support of the nobility, who feared any potential radicalism. The absence of a rising bourgeoisie to develop commerce and urban industry, or to take over the administrative state apparatus largely explains why Spain was not able to productively benefit from its overseas empire so as to develop the foundations for a capitalist economy. Anderson argues that its overseas empire even 'slowed down' that process, as the colonies provided a structural substitute for metropolitan provinces:

"The supply of huge quantities of silver from the Americas (...) provided Hispanic Absolutism with a plentiful and permanent extraordinary income (...) [which] meant that Absolutism in Spain could for a long time dispense with the slow fiscal and administrative unification which was a precondition of Absolutism elsewhere: the stubborn recalcitrance of Aragon was compensated by the limitless compliance of Peru." (1974: 71)

In the late 16th century, Spain became the major importer of grain, but with an unusual rural society in comparison to the rest of Western Europe (*ibid*: 72). With sixty to seventy per cent of the rural population being agricultural labourers, i.e. *jornaleros*, unemployment remained high in villages, where only one third of the male population worked in agriculture. Anderson notes “a premature and bloated ‘tertiary sector’ (...) which prefigured secular stagnation to come” (*ibid*: 73). Manufacturing decreased once the cost of production soared, making the textile industry a victim of Bolivian silver, as the influx of bullion created inflation. In addition, Spain’s relationship to the Habsburg State, which will be further discussed below, became one of interdependent collapse rather than constructive partnership (*ibid*: 74). Finally:

“In the cataclysm of the 1640s, as Spain went down to defeat in the Thirty Years War, and bankruptcy, pestilence, depopulation [from eight and a half million in 1600 to seven million in 1700] and invasion followed, it was inevitable that the patchwork union of dynastic patrimonies should come apart: the secessionist revolts of Portugal, Catalonia and Naples were a judgement on the infirmity of Spanish Absolutism. It had expanded too fast too early, because of its overseas fortune, without ever having completed its metropolitan foundations.” (Anderson, 1974: 81)

Anderson thus concludes on an ‘inordinate’ Spanish absolutism, which in the end merely consisted in the territorial benefits it acquired from its alliance with the Habsburg dynasty and from the *Conquista*. In other words, Spain’s advantage over other European powers was its geopolitical accumulation, i.e. its ability to control foreign land through policies of dynastic alliances and war. In Wood’s terms (2003: 43), “the economic hold of the empire was always limited by the capacities of its extra-economic power”, i.e. military conquest, forms of extra-economic exploitation and the slave trade.

We can now better formulate our previously stated problem: *how could, in the end, crippling strategies of accumulation lead to innovative and foundational theories of international legal thought?* On the one hand, if we follow the historiography that heralds this era and the work of the neo-Scholastics as foundational to IL, this section would have to conclude that social developments remain separate from intellectual debates. On the other hand, if we do not make such assumptions but nevertheless are forced to acknowledge the contemporaneous importance and lasting impression of these scholars on the discipline of IL, whether warranted or not, we have to question and unpack the concepts of ‘geopolitical accumulation’ and ‘extra-economic power’.

The following section will therefore turn to exposing the geopolitical schema and dynamics of this Spanish legalistic empire. Its continental reach was achieved from the alliance of the Spanish Crown with the Habsburg dynasty, coupled with the expeditions of the

Reconquista to secure the Iberian Peninsula. Meanwhile, its maritime expansion was distinguished by two separated but closely linked impulses: the crusades for the North African coasts and Canary Islands, and the *Conquista* – the discovery, appropriation and colonisation of the new American continent.

The European Geopolitics of Legal Categories

This section explores the geopolitical practices that provided the *conditions* for jurisdictional accumulation. First though, a conventional picture of European geopolitics in the 16th century will be drawn.

Four central themes are thought to define the European experience of this period: the Renaissance, the Reformation (Protestant movements emanating from Germany), the Counter-Reformation (i.e. the alliance between the Spanish monarchy and the Catholic Church) and the overseas discoveries (Mackenney, 1993: 4-5). As Elliott argues (1963: 44-45), the Spaniards' successes were due to a strong military and crusading tradition, their maritime experience and geographical position, the union and teamwork of Spain's regions each bringing particular skills, and its well developed commercial activity with different parts of Europe. The competitive hostilities with Portugal played an important part in pushing the Castilian Crown into risky overseas expansion. The fight between the two maritime powers for rights over the Canary Islands at the end of the 15th century was a major determining factor for the development of Spain's overseas Empire. As we will see below, the Spanish Crown embodied by the Habsburg dynasty went on to define European politics and make its territories the battlefields of militarily fuelled and politically unstable dynastic rivalries, thereby pushing aside the papacy and any claims to a united Christendom. Europe was reshuffled and a new world was discovered. Spain was the best-equipped power to deal with both fronts, as its experience, gained from wars on and around the continent, was used across the Atlantic. However, in the long run these two fronts made it lose sight of its social development at home.

From the Papacy to the Habsburg Dynasty

After the *Reconquista*, the papacy was not in any position to impose demands on the Spanish Crown. The relationship had shifted. "Where once the popes had preached the Crusades to which the princes had rallied in support, the process had become one of papal recognition of the independent aggressions of Christian princes, while rescuing whatever measure of control they could under the circumstances." (Dickason, 1989: 175). So what made Spain act as if the relationship remained more or less equal? What is essential here,

and throughout the analysis of Spanish imperial politics, is its attachment to in a sense proving morally and legally the rightfulness of the Crown's position. As according to the legal authorities of the time, rights of discovery only applied to unoccupied territories, and this was hardly the case; Fernando and Isabel needed the Papal bull to build their case for possession. When Columbus planted the Spanish flag and renamed Guanahani Island as San Salvador, and wrote back that he "found many islands filled with people innumerable" (*in* Anghie, 2005: 13), the Crown had to obtain the right to evangelize to secure its imperial interests. Dickason (1989: 268) remarks that the Americas were estimated to be the home of twenty per cent of the world population at the end of the 15th century. This also explains the reasons for the Crown's decisions to heavily involve the clergy in the colonisation process. In the end, imperial interests were a stronger factor for the monarchy's continuing links to the papacy than a genuine desire to spread the faith:

"It was with imperial interests in mind that Fernando and Isabel sought papal sanction to take whatever measures would be necessary to evangelize the non-Christian inhabitants of this new world." (Dickason, 1989: 180).

One could identify a balance of power between the papacy and the Spanish Crown, as existed between both a mutuality of interests, which lead to a shared recognition of authority and support. In the long term though, Spain kept the upper hand on the subject of the colonies, as bulls from Paul III (1534-1549) and Urban VIII (1623-1644) in defence of the Indians were never applied or enforced (Dickason, 1989: 181). The strength of the Spanish monarchy seemed to lie, on the one hand, in its ability to use, control and also respect the Church's authority, as is seen by the continuous demand for papal bulls, by the fact that the Crown's councillors were for the majority ecclesiastics, and by giving bishops the particular responsibility of protecting Amerindians. On the other hand, the Spanish Crown maintained its capacity and strength in temporal matters, by invoking its rights of discovery, by negotiating demarcation lines with Portugal (Treaties of Tordesillas in 1494 and Saragossa in 1529), and by using force while breaching the Treaty of Saragossa in 1542-43, marking its military superiority over Portugal (*ibid*).

In contrast, Spain's relationship with the Habsburg dynasty was a complex web of intermarriages and inheritances. At Isabel's death, her daughter Juana was to inherit the throne. Juana was married to the Archduke Philip, son of Emperor Maximilian I and Mary of Burgundy. Many factors pushed for the alliance of the two families. Elliott (1963: 127-128) mentions aristocratic intrigue and ambition, but it was mostly the economic interdependence of Castile and the Low Countries, fuelled by the development of the Castilian wool trade and, later, the trade in colonial products and American silver. Juana and Philip's son, Charles of

Ghent, was henceforth moved to Spain with his court in 1517, crowned King of Castile with his own Flemish ministers as government, and finally was made Holy Roman Emperor Charles V in 1519. The Habsburg sovereign was an 'absentee king': "Of his nearly forty years as King he spent just under sixteen in Spain (...) made up of one long stay of seven years, and five shorter visits" (Elliott, 1963: 154). The territory he acquired for Spain was extensive. It involved the Netherlands, Austria, Burgundy, the Kingdom of Naples, Sardinia and Sicily. In short, Spain's continental reach covered central Europe, announcing the domination of the Habsburg dynasty against that of the Valois of France, who, represented by Francis I, battled relentlessly against Charles V over the Italian states. The papacy chose to join the French side, which finally marked the end of its supreme position as spiritual head of Christendom, and its split from the Holy Roman Empire. The Habsburgs continued to dominate after Charles V by his successor Philip II, but his problems in the Netherlands were a serious threat to his authority. The treaty of Cateau-Cambr sis in 1559 was finally signed between him and Henry II of France:

"There was little for either side to celebrate (...) The wars between the Houses of Valois and Habsburg show that the narrowness and instability of dynastic politics were all the more explosive in a context of expanding military commitment. Dynastic politics were ill-equipped to provide the kinds of institutional and legal structures which might have acted as safety precautions." (Mackenney, 1993: 242).

The second half of the 16th century saw the beginning of the split between Spain and the Habsburgs. The following summarises what Teschke identifies as absolutist sovereignty, characterising Europe at the end of the 16th and throughout the 17th centuries:

"The persistence of pre-capitalist property relations in *Ancien R gime* states implies that the reproduction of the dynastic-absolutist ruling classes continued to be driven by the logic of (geo)political accumulation. Dynastic sovereignty and geopolitical accumulation determined the conduct of early modern international relations. Proprietary kingship entailed empire-building, political marriages, wars of succession, dynastic 'international' law, bandwagoning, and an inter-dynastic compensating equilibrium that eliminated smaller polities. These core institutions structured early modes of aggression, conflict resolution, and territoriality. Dynastic strategies of reproduction explain the *mode of operation* of the absolutist geopolitical system." (Teschke, 2003: 217-218)

However, by exploring the relationship between the *Reconquista* and the *Conquista* in what follows, it becomes apparent that legal strategies of reproduction played a more significant part than Teschke acknowledges here.

From Crusades to Discoveries

The Canary Islands, finally secured in 1483, became a staging post on the way to the New World, and were also “the perfect laboratory for Castile’s colonial experiments”, the “natural link” between the *Reconquista* and the *Conquista* (Elliott, 1963: 46). 1492 marked the end of the *Reconquista* with the taking of Granada and the beginning of expeditions into North Africa pushing the Moors further south. 1492 was also the beginning of the *Conquista*, as Columbus was granted three caravels to explore a Western route to China, and found the Bahamas. It was also an end in that the discovery of the New World was the culminating point in Castilian overseas expansion (Elliott, 1963: 33). As Hanke notes, this is exacerbated by debates among historians concerning the nature and extent of the shift between these two movements of foreign policy. He relates Konetzke’s point (Hanke, 1974: 182), that the taking of Granada and its subsequent forceful conversion of the Moors marks a “fundamental shift” and “the end of the Middle Ages” (Konetzke, 1958: 5), since the new Crown’s political considerations were now influencing the crusading engagement rather than the opposite. Therefore, one could argue that the shift from Crusades to Discoveries was characterised by the overtaking of religious influence by monarchical policy. However, Hanke does temper this argument by concluding that for Spaniards more generally, the distinction between religious and political motives was still very blurry, both spheres serving each other’s purposes: “The more one studies the European background for the Conquest, the clearer it becomes that there was no single medieval experience but several, at least in Spain, depending on the period and the area. Both the use of force and peaceful persuasion policies were tried.” (Hanke, 1974: 5). In sum, there is no clear or useful division between the *Reconquista* and the *Conquista* in terms of state policy, but rather similarities that help understand the development of one into the other, and how mistakes were learned from one experience to the other. Moreover, one must not forget that Crusades were also ongoing throughout the 16th century, especially against the Turks in the latter half.

Although both movements were similar in method and showed signs of continuity in terms of imperial policy, the Spanish Crown, with the full support of the papacy, took much effort to differentiate them legally. The difference in legal classification was crucial, as it was later to become central to the problem of the Amerindians’ legal status and the legitimating of war in the Indies. Although both types of expeditions are commonly understood as being bathed in catholic sentiment and ultimately justified by the supreme goal of spreading the Catholic faith, the difference lay in the religious nature of the enemy. Muslims and Moors were referred to as Infidels, and the use of force against them was not a subject of dispute like it became concerning the Amerindians (Hanke, 1974). For example, Las Casas, a great

defender of Indians' rights to be preached and converted peacefully, maintained in contrast the legality of the use of force against non-Christians such as the Turks: "the Church may wage war against infidels who maliciously impede the spread of the gospel" (*in* Hanke, 1974: 91). The argument behind this claim was that infidels were allegedly aware of the gospel and chose to refuse it; therefore, the use of force is not an abuse of their rights. More importantly maybe, as Hanke remarks, "Opposition to the anti-Moslem crusades was considered in Catholic Europe to be a Lutheran error" (*ibid*). In any case, the confusion during the 16th century between notions of crusades and discoveries is crucial, as it points to the deeper issue in the law of nations of who determines titles to land-appropriation. *Furthermore, it illustrates the way in which legality, and specifically, the differentiation between types of jurisdictional accumulation (crusade or discovery) started to constitute a defining strategy of Spanish expansion.*

This point can also be made in relation to the above discussion on the shift of power from the papacy to the Habsburg dynasty. The pope donated bulls that determined sovereigns' right to crusade and to use the land it had acquired thereof. In contrast, defining wars of discovery was a strategy of legal expansion, conditional to jurisdictional accumulation, and which marked the Castilian Crown's upper hand over the papacy. However, since it used the argument of the possibility of acquiring land not previously owned by a Christian prince, it still obeyed principles of the medieval *ius gentium*⁹¹. Schmitt discusses this issue and argues that the early stages of the *Conquista* as well as its theoretical justification by Vitoria mark the most important and also the last expression of the *ius gentium* of the Christian Middle Ages, since it established rights of occupation over non-Christian land through the authority of the Pope:

"Throughout the Christian Middle Ages, the distinction between the territory of Christian and non-Christian princes and peoples remained fundamental and characteristic of that spatial order. For this reason, war between Christian princes, understood as limited by *jus gentium*, was, of course, different from war between Christians and non-Christians. The pope could issue mandates for either missions or crusades to the lands of non-Christian princes and peoples, which established both the justice of war in international law and the legitimacy of territorial acquisition. Thus, as early as the 10th century, in the Ottonian era, German emperors received missionary mandates to convert the heathen Slavic peoples and to expand their territory in the East. The pope's proclamation of a crusade against the infidels became a title of great political significance in international law, because it constituted the basis for the acquisition of the territory in the Islamic Empire. In its first stage, on which Vitoria's arguments are based, the Crown of Castile's

⁹¹ This adds to the general argument against the 'modernity' of the Spanish era as founding to IL, but also against the homogeneous Marxist view of Spanish expansion as the early universalisation of the international legal form.

appropriation of American soil was completely in line with the international law of the Christian Middle Ages. In fact, it was at once its apogee and its climax.” (Schmitt, 2003: 112)

Implicitly, Schmitt’s point asserts the continuity between crusades and discoveries and their similarity in regards to their legality. However, this should not distract from the argument that the formal differentiation sought after by the monarchy and its intellectual elite constituted a shift in geopolitical strategies of power assertion, even though it built on earlier instances of juridical expansion. This is exemplified again by the role of medieval practices of extraterritoriality, as these served as models for more elaborate strategies of jurisdictional accumulation ‘on the ground’. Elliott explains how the *Reconquista* and the occupation of the Canaries were a “blend of private and public enterprise” (1963: 47), where the State, although maintaining its legal authority, contracted with merchants and military leaders to take care of the expeditions. The contract called ‘*capitulación*’, which later became “the customary form of agreement between the Spanish Crown and the *conquistadores*” (*ibid*), originated from the private military contracts common during the crusades. Again, this exemplifies the way in the Crown adapted existing extraterritorial regimes, i.e. Capitulations, to their own needs of expansion and legitimation. Rosenberg (1994: 109-114) also argues that the *Reconquista* was a model and example for the *Conquista*, notably concerning the ‘institutional devices and forms’ used by the new settlers and tested during the *Reconquista*⁹². For example, *encomiendas*⁹³ had been adapted from institutions developed in reconquered Moorish territories (*ibid*: 109), and the agrarian change put in place from agricultural labour to a pastoral economy was also copied from that practiced in the Iberian Peninsula (*ibid*: 111). However, the fact that these medieval practices served as models cannot imply that they were merely copied. Their integration into new lands and over new peoples produced unique social relations. Thus, in Schmitt, Rosenberg and Teschke’s analyses, the way in which this model transformed into specifically legal processes of accumulation is not sufficiently explored or taken seriously. To this effect, the following section will look at the colonial practices of jurisdictional accumulation ‘on the ground’ that followed from the above conditions, and how these led to determining doctrinal debates.

The ‘New World’ Doctrine and Practice of Jurisdictional Accumulation

⁹² Moreover, the attitude of the conquerors was similar in both types of expedition: it was characterized by a greed for gold, contempt for sedentary life, and created a *hidalgo* class with similar ideals to those of the aristocracy.

⁹³ *Encomiendas* were the forms of settlement put in place in the colonies. They are further explained in the section below.

This section first details the social property relations that were imposed and then developed in Spain's American colonies, before presenting the major debates and arguments that emerged from their legitimization.

De Facto Colonisation

Conquest and Settlement

The *requirimiento* was the legal ceremony that took place before the appropriation of land. It is important to recall how “*conquistadores* were accompanied by chaplains, missionaries and learned notaries” (Schwarzenberger, 1962: 53), illustrating the unity of the political and religious spheres but also the Spaniards' need to demonstrate their dedication to legitimate colonisation in the eyes of God and European contenders. In effect, this legality consisted of the following:

“[The notaries'] task consisted in making sure that due legal form was given to all transactions during such expeditions. The *Requirimiento*, a Spanish Royal Proclamation drafted by Palacios Rubios in 1513, illustrates what this meant in practice.

The document had to be read in full by a notary and translated to the Indians. It consisted of a fantastic saga of Papal and Spanish claims to the New World and left the Indians with the alternative of acknowledging the supremacy of the Pope and of the Spanish Crown or enslavement and confiscation of their property. When the ceremony was completed, and the Indians were still proving recalcitrant, the way was free to war or annexation of their territories.

In any case, nothing was easier than retrospectively to fit the facts into the generously wide categories provided by naturalist moralists and writers. (...)

However idealistic the intentions of the Spanish naturalists were, in fact, their doctrines provided highly convenient ideologies for the empire-builders of the 16th century.” (Schwarzenberger, 1962: 53)

These ceremonies were meant to legally authorise Spaniards either to rule over the Indians and exploit their labour and land, or to wage a just war against them and claim possession of their labour and land as the victor's right. The war was claimed to be 'just' since the Indians were given a choice through the reading of the *requirimiento*. If they refused to acknowledge the Christian faith and Spanish authority, Indians were given the same legal status as infidels, and forced conversion became admissible. In either case, the Spaniards established their claim to the ownership of Indian land and labour. The only choice the Indians had was how they would 'give up' something they had in most cases not even

conceived as tangible or detachable from their selves or their community. It was first used in 1514 and last used in the 1550s (Dickason, 1989: 190).

Second, the most common practice of settlement was an *encomienda*. These are best described as the “allocation to leading settlers of groups of natives as labourers or personal servants” (Parry, 1990: 100). *Encomiendas*, similarly to feudal estates, came with duties and privileges. They were an indispensable tool for the Crown to colonise its ‘discoveries’, but later became a major problem as the settler-elite became more difficult to control and manipulate. “The *encomendero* could build a house, maintain a household and continue to feed and arm his personal followers. In return he was required to protect ‘his’ Indians against other would-be exploiters, appoint and pay parish priests in his villages, and bear his share of the military defense of the province.” (*ibid*). The *encomendero* had no other administrative or judicial duties, i.e. was not a political agent, and was not granted land. Therefore *encomiendas* were not feudal manors neither slave-worked estates, as agriculture or land was not the major interest. Wood makes the point that the relationship between monarchy and military leaders was very similar to what had characterised European feudalism, but the property relations and privileges in place created something different: “It became a murderously extreme form of exploitation, little short of slavery, and responsible for killing huge numbers of Indians” (2003: 39). In some cases, the leading settlers just took the place of Aztec or Inca rulers, appropriating their tributes and services (Parry, 1990: 101). The major role of *encomiendas* was to provide a settled professional army throughout the land to protect the Crown’s acquisitions, described by Parry as a “quasi-feudal militia” (*ibid*). This army was also supposed to be transformed into an “official and permanent organisation for local government” (*ibid*), similarly to what existed in Spain, although this tradition of municipal incorporation was already decaying there.

Most towns in the Indies were “thatched huts” (Parry, 1990: 102), but with the essential characteristics of legal incorporation. This meant jurisdiction over the surrounding country, control of Indian labour, a dependence upon Indian supplies for subsistence, and a geography of Spanish centres and Indian suburbs. Soldiers became *vecinos*, i.e. legally enrolled householders of one or other of the incorporated towns from each conquest, but they still lived in the capital city. Finally, legal incorporation meant that the administration of the capital city was responsible for that of the province. The city-government, *Cabildo*, was composed of twelve *regidores* (councillors) all nominated by the commander of the conquest. The *Cabildo* elected from the ensemble of *vecinos* two *alcaldes* (municipal magistrates), whom after a year elected their successors. What is meant here by ‘election’ is the presenting of a list of names to the commander, who *in fine* decides who is ‘elected’ (*ibid*). In an *encomienda*, each group of Indians (a hundred or multiples of hundred) was assigned to a

Spaniard who could employ their services as he saw fit. This measure was given legislative approval by Ferdinand in a decree of 1509.

In 1542 the New Laws of the Indies were published, and represented a “drastic curtailment” of settlers’ privileges. Two articles abolished *encomiendas*, which was an impossible task in practice. This illustrates how the Crown was beginning to lose touch with the new settlements and thus looking increasingly worried of the *encomenderos*’ growing power. It was also a response to the mounting criticism in Europe, and consisted more of a political move in regards to these rather than a viable policy.

Social Classes

New World Spaniards first consisted of settlers and clergy, then increasingly of a body of officials, lawyers, notaries and miscellaneous quill-drivers. In the few big towns, one could also find merchants, shopkeepers and craftsmen (Parry, 1990: 173). The settlers were not an extremely varied social group, as they were divided in *encomenderos* and their followers, ranchers and mine-owners. Generally, they were armed subjects of great privilege and sometimes, great wealth. The clergy was numerous in relation to Spaniards, but not in relation to the Indian population. The clergy served in many ways as mediator between all other social groups, and, alongside proselytising, were given the mission to ‘protect’ the Indians. The Indian population, who produced grain, vegetables and poultry, provided the settlers with food and labour. Significant numbers of African slaves were mainly found in the islands and some Caribbean coasts (*ibid*). One of the major problems that emerged from the colonisation was the contrast, and consequently conflict, between European and Amerindian ways of living. What seemed to Europeans to be the natives’ ‘idleness’ was the natural consequence of a life sustained by subsistence farming, hunting and fishing. Compulsory labour, accepted in Europe’s agrarian societies, meant forced labour or slavery for Indians, a fact which settlers struggled to understand (*ibid*: 175). This problem was more largely connected, as Parry shows, to the different conceptions of freedom. The liberty enjoyed by a legally free peasant in Spain was “within the context of the whole society to which he belonged, and subject to discharging the appropriate obligations towards that society, as laid down by custom” (*ibid*). In other words, a peasant in Spain was only free as regards his relationship to the owner of the land on which he lived or for whom he had to pay tribute and services; that legal relationship was personal and property was conditional, as in any other feudal society. For Indians living on subsistence farming (not all were, as was seen by the discovery of the Aztec and Inca Empires), there was no personal and conditional relationship between ruler and ruled, therefore “instead of laying on Indians a general compulsion to work

(which was held to be compatible with liberty) it placed them in permanent personal servitude to individual Spaniards" (*ibid*: 176).

More specifically, Wood sees Spain's American colonies as semi-feudal societies. She explains this ambiguous position as one where, although the model set out at the beginning of the colonisation was feudal (as the "exchange between monarch and military leaders" was set in terms of "conditional rights of property and jurisdiction vested in the lord in exchange for military services"), it did not create a European-type feudal aristocracy (2003: 38). Moreover, Spanish colonisers differed from their English and French followers by their aristocratic rather than commercially or agriculturally productive practices. Wood insists on how this affected property and class relations in the New World, making Spain's conquest and colonisation 'organic' and directed to society as a whole:

"We are told, for instance, that the English and French were interested in commerce and agriculture, and set out to cultivate the land in America, while the Spanish 'had gone to occupy and to benefit, as all good noblemen did, from the labour of others'. This is the primary reason for the absence of the *res nullius* principle in Spanish justifications of empire, in contrast to both English and French. While their imperial rivals were interested in claims to land, the Spanish were at least as concerned with command over people and labour." (Wood, 2003: 91)

After Antonio de Montesinos, a Dominican friar, openly attacked the system in 1511, the first general code, the Laws of Burgos, was published in 1512 governing the status and treatment of the natives: "Every male Indian was to be required to spend nine months of the year in Spanish employment, and one third of the total labour force was to be employed in gold production" (Parry, 1990: 177). But the code, although seemingly responding to the attacks, did not resolve the problem. Although the concept of Indian liberty was accepted in principle, the code decided "most Indians were in practice incapable of making use of their liberty" (*ibid*: 178). Those who could be free were those who embraced the European way of life, i.e. accepted the conditions of colonisation; this new class of Indians was named *capaces*. 'Accepting' this kind of freedom gave Indians the privilege of being gathered in villages under their own headmen 'supervised' by Spanish priests and officials (*ibid*). Again, this was a conditional and personal relationship of freedom between ruler and ruled. We will now see how these new strategies of accumulation were legitimised.

"Technologically the colonization of the Americas was a relatively simple matter. (...) But the very simplicity of their collective enterprise, and the almost bewildering rapidity with which it advanced, posed for the Castilian crown serious problems of legitimation. From these early beginnings until Independence, the crown remained (...) overwhelmingly concerned with the need to defend its claims to sovereignty (*imperium*) and property rights (*dominium*) in America before an increasingly hostile world." (Pagden, 1990: 13-14)

From the Doctrine of War to Legislating Property Rights

1493 was the year of Pope Alexander VI's Bulls of Donation, in which sovereignty was given over discovered lands not previously owned by a Christian prince. This constituted the 'rights of discovery' Spain assiduously sought-after. In 1504 a *junta* (committee) of civil lawyers, theologians and canon lawyers decided that Indians should be given to Spaniards in accordance with human and divine law, implying the existence of property rights prior to colonisation. Montesinos accused the conduct of colonists and questioned the Crown's rights to *dominium* in a speech on the island of Hispaniola (known as Haiti today). In response, the Laws of Burgos (from a *junta* with civil jurist Juan Lopez de Palacios Rubios and canonist Matiaz de la Paz) were published in 1512 as the first regulations governing relations between Indians and Spaniards. Responsibility was put on the *encomendero* to build churches, baptise Indians and provide lessons in doctrine (Hanke, 1974: 8). For example, the document stated that: "No one may beat or whip or call an Indian dog (*pero*) or any other name unless it is his proper name." (*ibid*: 9). According to Roman law jurists, a legitimate civil society is based upon private property. Since, for the Spaniards, natives had no concept or system of property rights, it followed that they had no legitimate civil society. "Their lands were not *their* lands but merely open spaces which they, quite fortuitously, happened to inhabit." (Pagden, 1990: 15). Charles V established the Council for the Indies in 1524, which determined that "the Indians were free, ought to be treated as such, and induced to accept Christianity by the methods Christ had established" (Hanke, 1974: 11). Consequently, the Crown authorised social experiments in the Caribbean islands (Cuba, Hispaniola, Puerto Rico). These were meant to determine how Indians could be organised politically and thereby gain the right to property as legitimate Christians.

The debate intensified in the 1530s, notably in universities, as the argument underlying the Laws of Burgos became problematic when applied to the Aztec and Inca empires, where the existence of a civil society and property rights could not be denied. Rumours had crossed the Atlantic of Hernán Cortès's amazement, as conqueror of the Aztecs, at the physical and spiritual richness he had encountered. According to one of his soldiers, "people live almost like those in Spain" (Hanke, 1974: 12). The first ecclesiastical *junta* presided by the President

of the royal *Audiencia* decided in 1532 that the Indian was a rational being capable of governing himself. This was criticised and challenged by other ecclesiastics and branded as a position held by the 'devil in disguise'. In 1537, the Papal Bull *Sublimis Deus* was published, influenced by defenders of the Indians. At the same time, in 1539, Vitoria delivered his lecture *De Indis*, whose project was the "elaboration of a rationalistic moral philosophy based upon an Aristotelian and Thomist interpretation of the Law of Nature" (Pagden, 1990: 16). Suárez, Soto and Molina then further elaborated the neo-Scholastic and anti-Reformist project.

The New Laws of the Indies were published in 1542, and finally, the 1550s saw the battle between Las Casas and Sepúlveda at Valladolid in front of the "Council of the Fourteen" summoned by Charles V. The main question put to the debaters was: "Is it lawful for the King of Spain to wage war on the Indians, before preaching the faith to them, in order to subject them to his rule, so that afterward they may be more easily instructed in the faith?" (Hanke, 1974: 67). The following will look at this debate, and contrast it with Vitoria's legitimization of the conquests. These, I argue, constitute the doctrine of jurisdictional accumulation.

From Property Rights to Legitimizing Accumulation

For Juan Ginès de Sepúlveda, "[c]ivilization and Christianity went hand in hand. Conquest was a religious duty, an act of charity towards ignorant and unfortunate neighbours" (Parry, 1990: 148). He identified four principal rights entitling a nation to wage a just war: the natural right of repelling force by force, the recovery of possessions unjustly taken, the necessity of punishing criminals who had not been punished by their own rulers (since all men were neighbours and mutually responsible one for another), and finally the duty of subduing barbarous peoples by force if they refused to submit voluntarily to government by a superior race. The last right was the one that applied to the Americas. It depended on four causes: the naturally servile nature of barbarians and consequent need of civilised masters, the habitual crimes against natural law, the plight of the subjects of barbarian rulers, victims of oppression, unjust war, slavery and human sacrifice, and the duty of making possible the peaceful preaching of the gospel.

Sepúlveda then made a distinction between the right to Indians' private property and the right to their labour, denying the former to the conquerors but allowing the latter. Employing them served also an educational purpose, and the conquerors were seen as exercising a "mixed and tempered paternal authority" (Parry, 1990: 148). This comment provoked criticisms from his contemporaries, accusing Sepúlveda of being an apologist of slavery. Parry contrasts Las Casas and Sepúlveda by noting that they displayed "two

divergent yet complementary tendencies of the imperialist theory of their time.” (*ibid.*: 149). They both sought to modify royal policy and limit the exercise of royal will, and “the full implications of either theory were more than any self-respecting government of the time could stomach” (*ibid.*). Indeed, both were against the consolidation of absolutist rule, Sepúlveda eager to replace it with a stronger aristocracy, and Las Casas more concerned with the precedence of local laws and the laws of God (as long as they were peaceful).

Las Casas spent a large part of his life in the Indies, and is known as the great defender of Indians’ rights. His main contribution was to challenge Sepúlveda at the Valladolid sessions, for which he wrote two treatises. He provided each of Sepúlveda’s arguments with a series of counter-arguments. The major point made by Las Casas contends that force cannot be used to enrol people into the faith, even if preaching the gospel remains an obligation (Hanke, 1974: 91). This issue was obviously coming to a head in the 16th century as the Age of Discovery brought into conflict notions of *ius gentium* concerning non-Christian territory. For Europeans, Amerindians were obviously different to Muslim infidels, but how was this to be translated legally? As mentioned above, Las Casas did not extend his argument to the Turks or to other Non-Christian enemies of the European and African continents, which reminds us of the explosive character of these ideas and the limits they could not yet transcend. Las Casas was appalled at Spanish conduct towards the Indians, and throughout the treatises he sets out to defend their cultures. One must recall how many writers represented the Indians as savages and beasts. Las Casas even tried to defend human sacrifice as a natural act, and recognised good faith in the pagan who is prepared to sacrifice the most important thing there is, life; he reminds the judges that sacrifice is at the core of the Christian faith: “For him, the religious beliefs of the Indians were valid – for them at that time – and in no ways indicated atheism. He even considered them more truly religious than those Spaniards who tried to attract Indians to their civilisation and their religion by ‘fire and sword’.” (Hanke, 1974: 94).

In contrast, Vitoria’s academic and less political approach was more influential, since his moderate conclusions were more malleable. Firstly, the central premise of Vitoria’s lecture *De Indis* claims that *dominium*, i.e. the “public, private, and pacific possession of their things” (Pagden, 1990: 18) is a natural right. In other words, it is not dependent upon social practice. Therefore, it followed that Amerindians had a natural right over the land they inhabited. However, this conclusion did not stop Vitoria from legitimising the colonisation. Spanish imperialism was made lawful by showing that the Amerindians had forfeited their natural right to *dominium*. Vitoria elaborated four cases in which individuals could be denied their natural right. They referred to four statuses: sinners, infidels, *insensati* and idiots. The last status, idiocy, could not apply to the natives, as it would have required them to be previously subject to the laws of the enacting state. The first two, sinners and infidels, were

refuted by Vitoria as part of his central aim to counter Lutheran and Calvinist theories of sovereignty. Catholic theorists had to refute the latter's ideas according to which a ruler fallen from grace could be legitimately deposed by subjects or by a godlier ruler. This led Vitoria to conclude that *dominium* was independent of grace. The third option was therefore left, i.e. that Amerindians were *insensati*; "creatures who were incapable of receiving injury clearly could not be subject to laws and could not, therefore, be the objects of rights" (*ibid.* 19). This was compared to Aristotle's notion of natural slaves. Vitoria refined this option though by claiming that Amerindians had basic elements of rational society, and therefore were not rights-less beings. He concluded that they should be considered as 'natural children', i.e. 'heirs to a state of true reason', "in full possession of their rights without being able to exercise them. The Castilian Crown might thus claim a right to hold the Indians, and their lands, in tutelage until they have reached the age of reason. The acceptance by any civil prince of such peoples 'into his care' might even, Vitoria concluded, be considered an act of charity." (*ibid.* 20).

Secondly, concerning *ius gentium* ("that which is constituted by natural reason among men"), Vitoria identified the right to travel, the right to trade, the right to preach and the right to wage just war. If those rights were in any way opposed, it was legitimate for them to be enforced, as depriving natural rights is an injury, and a just war is the vindication of injuries (*ibid.* 21). Once this injury defended, the belligerent can appropriate his opponents' private property. The victor becomes the judge, holds the authority to ensure that no future injury occurs, and can make slaves out of the prisoners. Moreover, Vitoria discloses the possibility of deposing rulers when the offence is very great or when the enemy is incapable of arriving at a peaceful solution, as was the case with the Indians (*ibid.* 22). He specifies that since fornication, cannibalism, sodomy and human sacrifices were crimes against nature and thus offences against God, they therefore were punishable by God only and could not be legitimate reasons to appropriate *dominium*.

"Vitoria left the Crown with only slender claim to *dominium iurisdictionis* in America but no property rights. If, as seemed to be the case, 'these barbarians have not given any reason for a just war, nor wish voluntarily to accept Christian princes, the expeditions must cease'. In the end all that remained was the starkly objective claim that since the Spaniards were already there, any attempt to abandon the colonies would result only 'in a great prejudice and detriment to the interests of [our] princes, which would be intolerable'." (Pagden, 1990: 22).

In sum, the interests of the Crown and their manifestation through these new practices of jurisdictional accumulation (wars of discovery, *requirimiento*, organic social restructuring, restricted *dominium*) prevailed over medieval theories of universal *ius gentium* and even over

neo-Scholastic arguments. However, if these practices constituted a shift from the past, it does not follow that they laid the path to modern IL. For example, Vitoria was not arguing for Spain's rights within an international framework of equal sovereign states. In contrast, he was using arguments from natural law and *ius gentium* within the paradoxical judicial framework of the 'Castilian commonwealth' (Owens, 2005) and for its legitimation in the face of the Reformation.

Conclusion

The previous chapter provided four analytical angles through which to map out the phenomenon of juridical expansion in each case of international legal hegemony: Spain, France and Britain. These four angles (geopolitical orders and dialectical dichotomies, legal institutions, class relations and finally, legal and political thought) have been interdependently used throughout the present chapter to argue that the period of Spanish imperialism constitutes one of jurisdictional accumulation.

The first section teases out of the existing historiography on early modern Spain and IL the problem of the shift from *ius gentium* to *ius inter gentes*. Unsatisfactorily, most historical work focuses either on state-building, neo-Scholastic doctrine, or colonialism. The PM approach developed here attempts, through the use of the four above methodological foci, to understand the role of *all* these factors in the development and influence of Spain on the shift in legal world ordering.

Specifically, the second section starts by analysing the institutions and social relations at the basis of the Castilian unification of the Hispanic kingdoms, and how this remained a contested and troubled process in spite of its far-reaching territorial achievements. From this analysis emerges the problem of how to explain the role of Spain in the transition between international legal orders: how could it be socially stagnant but legally innovative? Section three opens up the analysis to existing geopolitical orders and dialectical dichotomies, namely the papacy vs. the Habsburg dynasty, crusades vs. wars of discovery, Catholics vs. Protestants, neo-Scholastics vs. Humanists. Spain represented a unique type of state centralisation, however incomplete, which existed in a period of dynastic geopolitics marked by the specific ethico-religious character of competing monarchies and regional kingdoms. These contexts and their legal implications question existing notions of geopolitical accumulation.

The last section looks at the processes of jurisdictional accumulation, in terms of social property relations and legal and political thought. On the ground, peoples living on 'discovered' land lost their property rights before even acquiring any, a confusion caused by the inadequacy of late medieval theology and Roman jurisprudence. At the same time, these

theories failed to keep at bay the violent drive of the Spanish monarchy and of its army of *conquistadores*. Instead, military power and colonial interests, hiding behind a veneer of legal categories, reshaped living conditions and property rights according to the increasingly more complex distinctions between various forms of *dominium*. These distinctions were thereafter imposed back onto native peoples by socially organic strategies of jurisdictional accumulation such as the *requirimiento* and the *encomienda*. Moreover, they were legitimised by a complex web of theological and juridical arguments, that have since been watered down to establish the origins of IL with that of the *ex ante* peaceful regulation of Indian-Spanish relations.

In fine, although it arose out of a tradition that developed universal concepts of justice and of legal systems, Spanish legal and political thought was restricted and engineered by the collaboration of religious, juridical and military elites, to justify violent and organically transformative processes of jurisdictional accumulation. However innovative these processes were, they nevertheless left Spain's economy unable to develop out of its 'infirm absolutism'. The evidence of practices of juridical expansion defines them as categorically different to late medieval reciprocal treaties *and* later forms of extraterritoriality and primitive accumulation. Although their aim was similarly to claim jurisdiction over land and peoples beyond their remit, Spanish imperialists, theologians and jurists believed this aim required total social control and religious conversion of colonised populations. As has been well documented, these beliefs had disastrous consequences.

Resurrecting the study of Spanish legal practices and doctrine should be treated with much caution. However, conceptualising them as jurisdictional accumulation helps to highlight the constitutive but neglected role of practices of juridical expansion as strategies of power. It highlights the exploitative and destructive nature of legal power, but also the complexity of its relationship to religious doctrine and social property relations. As such, this history contests Marxist claims that see the universalisation of the legal form, and therefore of mercantilism and capitalism, occurring from these early days in the globalisation of trade. The accumulation of jurisdiction for the Castilian Crown did not lead to capitalist social relations, either in Spain or in its colonies. However, it did create a precedent for states in terms of legally justifying violent processes of expansion, albeit one they adapted to their own conditions.

Beyond this Marxist debate, this chapter begins to provide a firm basis to conduct the needed historical contextualisation of contemporary claims of judicial globalisation and U.S. extraterritorial hegemony. The next chapter will thus explore how 17th to 18th century France developed its own forms of jurisdictional accumulation.

CHAPTER 4 – FRANCE: REGIONAL, INTER-DYNASTIC AND MERCANTILIST JURISDICTIONAL ACCUMULATION

In the previous chapter, social property relations in the 16th century Hispanic kingdoms and their American colonies revealed that the defence and imposition of property rights significantly drove shifts in global and regional legal orders. It was argued that these shifts are better articulated through the concept of jurisdictional accumulation, than through doctrine-orientated concepts of *ius gentium*, *ius inter gentes* or ‘primitive’ IL, that reify distinct but erroneously progressive hegemonic orders. Instead, jurisdictional accumulation permits to draw a more spatially and temporally heterogeneous picture of legal strategies of expansion, while reconnecting neglected social relations to the construction of modern IL and the history of extraterritoriality.

In effect, an important step was made towards a reconstruction of this history. Moving along in time takes this task to the experience of France in the 17th and 18th centuries. In contention is France’s role in shaping the DPE, the period’s international legal order, as a structural model for modern IL. From this order, extraterritoriality is assumed to have simultaneously emerged as a *sine qua non* of ‘Westphalian sovereignty’. In contrast, this chapter breaks down this lineage. It shows that the concept of jurisdictional accumulation, as categorically distinct to 19th century extraterritoriality, applies once again to dynastic strategies of expansion, since neither French Absolutism nor the DPE developed abstract and exclusive forms of territorial sovereignty.

Historians associate the 17th and 18th centuries with the intellectual and institutional domination of France, carving the way for modern state-formation and public IL. Contemporaneous legal scholars named the period ‘DPE’, or the age of ‘European public law’ (*ius publicum europaeum*) in lieu of the more inclusive and universalist medieval *ius gentium*, the Catholic *ius inter gentes*, or the Enlightenment *droit des gens*⁹⁴. Westphalia, as IR and IL’s shared gateway to modernity, is also at the centre of conventional historical accounts. If critiques of this centrality have become more commonplace, historical reconstructions that take seriously the rejection of the concept of ‘Westphalian sovereignty’ remain rare. For example:

“Everything that paved the way to the highpoint of ‘Westphalian’ state sovereignty in the nineteenth century is put into the spotlight; everything that nuances, blurs or contradicts the picture is dusted under the carpet as a remnant of the old medieval system or an anomaly.” (Lesaffer, 2008: 3-4)

⁹⁴ Morin (2010) and Belissa (1998), both francophone scholars, use the term ‘droit des gens’. This refers to a specifically French and juridical-philosophical dimension that differs from the *ius publicum europaeum* ‘pre-positivist’ move associated with Hobbes and Grotius.

If Lesaffer raises here fundamental problems in the historiography of IL, the narrative he provides in its place still maintains a progressive and linear conception of historical development (2002: 115-128). His analysis of the French age focuses on the influence of Hugo Grotius and the emergence of the duality of state sovereignty, or, in effect, the anarchical condition of the states system. Similarly to historians such as Grewe (2000) but also to those influenced by the English School, this duality leads him to adopt a conception of IL that is detached from contemporaneous socio-economic transformations. Consequently, this conventional argument is contested by critical IL historiography and particularly by social histories of French absolutism. The latter reject the modernising potential of the absolutist state and emphasise the limits of its developmental trajectory by re-grounding their analyses in specific social struggles and authority relations (Anderson, 1974; Beik, 1985; Parker, 1996; Teschke, 2003).

In an attempt to develop this critical literature, the following research confronts Neoliberal Institutional accounts of extraterritoriality with the above debates on French Absolutism and the Westphalia-DPE paradigm. Raustiala's central argument lays out the implications of this narrative:

"SOFA's, capitulations, and the effects doctrine⁹⁵ all illustrate a central point. Over the course of American history the practice of extraterritoriality has shifted in form but not function. The Westphalian paradigm purposefully granted each sovereign exclusive control over its domain; the very point of *cujus regio, ejus religio* was to align religious differences spatially – Catholics here, Protestants there – and therefore compartmentalize them. When sovereigns interact, however, these differences in domestic law become apparent and often prove costly, and the costs of the barriers grow as interdependence grows. As America's place in the world system changed, and as that system itself changed, territoriality and extraterritoriality were manifested in new ways. There is, nonetheless, an *underlying logic* to these extraterritorial practices. *As in the past, extraterritoriality today typically flattens the legal differences that are fundamentally embedded in Westphalian territoriality.*" (Raustiala, 2009: 23, added emphasis)

If Raustiala acknowledges his bias towards American history and shows awareness to debates on Westphalia, these caveats do not eclipse his central link between contemporary extraterritoriality and the 'logic' of the Westphalian era. However broadly conceived, he retains the use of the term 'Westphalian sovereignty' to exemplify the emergence of the modern state, delimited by abstract and territorial, as opposed to personal, jurisdiction. Since this is disputed in current debates on dynastic geopolitics and French Absolutism, it becomes

⁹⁵ See chapter one for a definition of the effects doctrine, as characterising the post-1945 judicial evolution of extraterritorial principles in ascertaining jurisdiction.

crucial to unpack and reconstitute conceptions of extraterritoriality, or more exactly in this case, of the evolution of different strategies of jurisdictional accumulation.

Investigating this history shows that there were three different fronts on which different strategies of jurisdictional accumulation were played out: the inter-dynastic, absolutist and colonial fronts. Consequently, faced with this variety, it becomes much less obvious that contemporary extraterritoriality is the direct descendant of 'Westphalian territoriality'. Indeed, the following sections argue that the move towards less doctrine and more specialised practices of 'European public law' was to detract from more complex and contested local and colonial social relations, where strategies of jurisdictional accumulation proved less successful for the consolidation of dynastic states. In other words, the legacy of 'Westphalian territoriality', if anything, is the product of these three social and geopolitical contexts, and implies a much richer and contradictory source of origins for extraterritoriality.

Before assessing potential conclusions for understanding contemporary extraterritoriality and strategies of legal world ordering, this chapter needs to explore the 'French Age'. A first section presents the historiographical debates in question. Grewe's classic narrative on state rationalism, balance of power and a detached history of ideas will be contrasted to critical histories of political thought and, crucially, to Teschke's work on dynastic absolutism and personal sovereignty. Furthermore, this latter critique will be substantiated by looking at a revisionist turn in the history of French Absolutism.

The second section investigates the evolution of doctrine and inter-dynastic legal practices and argues that the period of French hegemony institutes a separation between legitimate realms of political and legal struggle, notably through a specialisation of legal mechanisms. In this case, jurisdictional accumulation, in contrast to geopolitical accumulation, consists in the isolation of a restricted international *qua* European society as an inter-dynastic 'private-public' club, aimed at asserting its members' authority.

The third section hones in on the absolutist front, or the construction of public law and French sovereignty. It first investigates pre-revolutionary political debates between absolutists, constitutionalists and Jansenists. It then complements this rich picture of social strife with the even more heterogeneous and unruly practices of the legal orders, namely the complex and politicised buoyant judiciary developing across different regions, office venality and the role of the king as legislator. This section thus confirms the revisionist turn and showcases the monarchy's difficulties in accumulating jurisdiction at home.

Finally, the fourth section develops the role of the French empire in disseminating mixed forms of jurisdiction. This resulted in a complex and legally anarchic patchwork of sovereign entities, highlighting the more pragmatic and detached attitude of the monarchy towards the colonies. These were generally left to settlers, mercantilists and trading companies to develop unique institutions or keep *Ancien Régime* ones alive. These

strategies of overseas jurisdictional accumulation reinforce the argument for the importance of inter-dynastic strategies of survival in the face of more internal and external setbacks.

Therefore, *contra* Raustiala and mainstream accounts, modern, i.e. 19th century-type extraterritoriality cannot be homogeneously traced back to a 17th to 18th century form of exclusive and abstract territorial sovereignty, since this form had not yet emerged. Secondly, *contra* Miéville, the French state cannot be assimilated to a general bourgeois state form in analogy to the individual as bearer of rights. What is more, inter-dynastic, absolutist and mercantilist practices are analysed as jurisdictional, not primitive or geopolitical, accumulation, since they respectively did not lead to capitalist relations of production but nevertheless found novel institutional ways of appropriating land.

The Emergence of Modern Territorial Sovereignty

The following needs to retrace the classic narrative of 17th and 18th centuries IL. Problems with this narrative will be raised, specifically in relation to its state-centric conception of European class geopolitics and French absolutism. Consequently, a growing revisionist literature on French state formation will then be presented as necessary background to understand the critique of the Westphalia-DPE model.

Emerging out of these debates, the section will conclude on the following problematique: how and why did the DPE emerge as a founding model of modern state sovereignty if it entrenched personal dynastic relations? The chapter will thereafter explore what types of legal strategies of accumulation were employed during this era, to what end, and whether they tell us something more about the history of IL and extraterritoriality.

Westphalia and the DPE, Models or Myths?

For most IL scholars, the period between 1648 and 1815 is referred to as the 'French Age' or the DPE. It marks the shift from *ius inter gentes* of the Spanish Age to *ius publicum europaeum*, a more strictly defined system of international rules characterised by the transformation of European states into public sovereign institutions and their graduation to the status of exclusive international actors. As such, the DPE sits as a *model* for 19th century IL.

"The 'droit public de l'Europe' appeared as a more developed and more substantial legal order of the European family of nations. It was marked by the spirit and style of French hegemony and became the model for a later, universally applicable international law." (Grewe, 2000: 294)

The distinction between the specificity of the DPE and its role as a model is crucial, and needs further investigation. Accordingly, the DPE was a model insofar as the general framework or order remained, even if certain elements ('dynastic succession orders and marriage contracts, courtly conventions and political maxims', Grewe, 2000: 28) disappeared with the 'global historical crisis' surrounding the French Revolution. Grewe's analysis of the DPE relies on a state-centric interpretation of French Absolutism, based on three arguments: rationalism, balance of power and the temporal disjuncture between political philosophy and politics.

First, the move towards rationalism is based on the important break in the relationship between religious and political spheres. After the Thirty Years War (1618-1648) and the treaties of Westphalia, the principle of religious intervention collapsed (Grewe, 2000: 334). In contrast, the relationship between political and economic spheres intensified, alongside that of the state and its administrative and military apparatus. From this political specialisation, a more precise definition of frontiers ensued and laid the ground for more detailed and complex international rules and agreements. On the other hand, this specialisation opened up possibilities of disagreements, violations and wars. Rationalism therefore led to improving *and* limiting inter-state relations:

"During the course of the French Age, significant progress was made in the techniques for redacting treaty texts and concluding and ratifying treaties. The parties remained open-minded as far as the binding force of treaties was concerned. An age which was dominated by the idea of *raison d'état* was naturally inclined to judge the binding force of a treaty in the light of changed political circumstances and to subordinate contractual fidelity to 'political necessity' – whatever was understood by that." (Grewe, 2000: 362)

Second, the principle of the balance of power became the 'regulatory principle of the state system', constituting a common strategy of power assertion. Grewe associates this principle with the practice of permanent diplomacy, which the period of the DPE standardises across Europe, along with the adoption of French as the diplomatic *lingua franca*⁹⁶. Other commentators echo this assumption: "It was the immense prestige of French culture and the status of the French monarchy as a model for much of Europe which gave the language its dominant position in diplomacy" (Anderson, 1993: 102).

Thirdly, Grewe claims that the revolutionary ideals concerning universal human rights and equality, developed during the Enlightenment and enshrined by the French Revolution, did not influence IL until 1919: "for a century the ideas of the Revolution concerning the law

⁹⁶ Anderson (1993: 100-101) notes however that if French became the language of negotiations, Latin survived longer as the language of treaties (until the late 17th century). Latin also remained longer in practice as the German states' diplomatic language, while the Near East retained the use of Italian.

of nations contributed next to nothing to this order; only in 1919 did they experience a rebirth.” (Grewe, 2000: 424). However, the revolutionary era is nevertheless deemed a “transitory stage” (*ibid*: 413), which sees the exclusion of more specific characteristics of the DPE. “After two decades of arbitrariness and lawlessness the European nations resumed the traditions of the law of nations, influenced by changed conditions and on the basis of a new, stabilised political balance of power.” (*ibid*: 424).

This last point is essential to understand the transitions of the DPE. First, Grewe claims that the Revolution led to a definite structural change, in “rendering the doctrine of sovereignty absolute” and completing “the full emancipation of the sovereign nation-state” (2000: 414). However, he then dissociates this structural and institutional international order from legal doctrine and Enlightenment philosophy. If the international order was maintained by the Napoleonic era, ensuring French hegemony “by way of imposed constitutions, enforced treaties and sovereigns installed through force of arms” (*ibid*: 413), this hegemony stalled the influence of revolutionary ideas on the development of IL.

In contrast, studies in the history of political thought and social property relations argue that using the event of the Revolution as a homogeneous factor of change is problematic (Belissa, 1998; Teschke, 2003; Gerstenberger, 2007; Shilliam, 2009). A focus on the social struggles, philosophical debates and conflicting institutions occurring across France form a complex picture of the revolutionary era that does not fit into Grewe’s narrative.

Firstly, critical perspectives of the history of political thought challenge the distinction between, on the one hand, the rationalisation of political institutions (the state model of the DPE) and on the other the belated and secondary development of political ideas. For example, the influence of English liberal thought and its role as political model and contender shaped and added extra pressure to the discussions of the revolutionary protagonists (Belissa, 1998: 126; 131). Moreover, Shilliam (2009: 30-56) highlights the mixed heritage and primary role of socio-ideological constructs in the development of British and French political actors, which he refers to respectively as the ‘impersonalized individual’ and ‘impersonalized collective’. He argues that the French developed a mixture of British individual property rights with the ‘backward’ and communal necessities of French social reproduction, encapsulated in the Jacobin.

Although Grewe notes the antagonistic relationship between France and England, he fails to incorporate their more intricate philosophical and political exchanges. This is specifically problematic for his argument on the belatedness of French Enlightenment thought, but also for his argument that principles of non-intervention, collective security and self-determination arose out of the Revolution. In contrast, Keene (2010) argues that the principle of non-intervention, for example, has its origins in the earlier dynastic trademark of the ranking of princes. Thus, Grewe’s lack of differentiation between specific social relations,

discourses and class structures pushes him to make false generalisations on the basis of his analytical bias for rational state formation and balance of power as founding conditions of public IL.

Secondly, from a social property relations approach, Teschke (2003) focuses on European dynastic relations and argues that France moved from a feudal to an absolutist regime anchored in pre-capitalist social property relations. Specifically, Grewe's focus on the balance of power obscures the phenomenon of geopolitical accumulation characteristic of the 'Westphalian' era. "Proprietary and personalized sovereignty promoted political marriages, wars of succession, and the elevation of dynastic 'private' family law to the status of 'public' international law" (2003: 246). Grewe acknowledges the introduction of these elements during this age, but also their exclusion during the 19th century along with that of the defining principle of balance of power (2000: 28). However their exclusion does not push him to question the role of the DPE as a model for 19th century IL. Instead, for Teschke: "European early modern international relations, codified in the Westphalian settlement, had their own 'generative grammar', a distinct territorial logic, and historically specific patterns of conflict and co-operation." (2003: 246).

Concerning Grewe's analysis of rationalism, these claims force us to ask how 'private' or personal (i.e. tied to the person of the king) was *raison d'état*. If proprietary kingship characterised absolutism, state rationality was only rational in so far as it perpetuated the bond between monarch and state. *Ancien Régime* state 'rationality' was the idealised product of the contest between the monarchy, the *noblesse d'épée* (the landowning or sword nobility) and the *noblesse de robe* (gentry that acquired title through, mostly, sale of office), set in particular geopolitical circumstances (the anti-Spanish struggle in Europe and competition with England in the colonies). Moreover, if a revisionist history of Absolutism, reviewed below, emphasises the monarchy's need to collaborate with the legal class of *Parlementaires* (influential high court judges), the rationality of the DPE must also be re-grounded in this unique social relation.

In sum, Grewe's analysis is here again contested, and cannot as such construct the basis to a history of extraterritoriality, since it dissociates structural elements of state formation and specific class interests. The approach adopted here, and substantiated by the following social history of absolutism, disputes the fact that these can be dissociated. We need to find another way of explaining the institutional legacy of the French era, somewhere in between model and myth. Can the concept of jurisdictional accumulation, after the Spanish case, again fulfil this task? First, though, the history of French state formation behind the above critique needs to be further discussed.

Revisiting French Absolutism

The period associated with the DPE spans from the height and fall of the Bourbon dynasty (from Louis XIV to Louis XVI or *Ancien Régime*), to the French Revolution, ending with the abdication of emperor Napoléon I in 1815. The common thread linking this period is France's European influence, although the regime's effective political hegemony was in contrast short-lived. The long reign of Louis XIV (1661-1715) is associated with state centralisation, rationalism and the exuberant display of undivided power, as the overly used metaphor of 'le roi-soleil' exemplifies. However, France's prime period of hegemony coincided with the preceding decades of "the still defective and incomplete state structure of Richelieu and Mazarin"⁹⁷, marked by institutional anomalies and torn by internal upheavals" (Anderson, 1974: 105). Indeed, Louis XIV's considerable feat was to contain the multifaceted and dispersed rebellions and divisions provoked by his two regent predecessors. He did this not by letting the bourgeoisie thrive and the masses breathe from less taxation, but by glorifying the prestige of the monarchy. He pursued socially suicidal belligerent campaigns and suffocated with aristocratic privileges the entrepreneurial spirit of the technical and commercial classes. "When Louis came to personal power in 1661, he brought with him memories of his turbulent youth and a determination to restore order and stability by forcing all these groups"⁹⁸ back into their appropriate places" (Beik, 2000: 15-16). In other words, he created a façade of absolutist and insurmountable rule that kept a crumbling society in check. European wars⁹⁹ (especially the anti-Spanish struggle) served to forge the new structures of absolutism, even if Louis XIV failed to fulfil his military aims due to strategic and diplomatic errors (Anderson, 1974: 98).

The *Ancien Régime*'s relationship to law showcases the kingdom's complexity and heterogeneity. The territory was divided up until the mid-16th century according to landowners' domains or governorships. Thereafter, the state was administratively constituted of *pays d'états* and *pays d'élections*¹⁰⁰. Sovereign courts were the *Parlements*, *sénéchaussées*, *baillages* and *généralités*¹⁰¹. Urban centres only accounted for ten to twenty

⁹⁷ Cardinals Richelieu (1585-1642) and Mazarin (1602-1661) were successive Chief Ministers during Louis XIV's childhood. Richelieu took office in 1624, and Mazarin continued ruling until 1661, when Louis assumed power. They are credited with being stark politicians and for having developed modern forms of governance.

⁹⁸ These 'groups' consisted of the landed nobility (or sword nobility, *noblesse d'épée*), an emerging robe nobility including *Parlementaires* and *intendants* (powerful royal commissioners), a socially deeply entrenched Catholic church, a diverse group loosely associated as the urban bourgeoisie, and finally, the lower classes consisting of some craftsmen and labourers, but mostly peasants (Beik, 2000: 4-15).

⁹⁹ Wars fought by Louis XIV were the War of Devolution (1667-68), the Dutch War (1672-78), the Nine Years' War (1688-97) and the War of the Spanish Succession (1701-1714).

¹⁰⁰ Under Louis XIV, *pays d'états* (for example, Languedoc, Provence, Burgundy, Navarre, Brittany, Artois, etc.) were provinces with surviving Estates, i.e. representative institutions. *Pays d'élections* (the larger group, for example, Champagne, Ile de France, Lyonnais, Touraine, etc.) were provinces with a *généralité* and an *élection*, i.e. major and minor administrative subdivisions and a court where taxes were imposed by an *intendant*, representative of the king.

¹⁰¹ Most of the North of France (a third of the whole territory) was under the jurisdiction of the *Parlement* of Paris. There were in total twelve *Parlements*, i.e. high courts of law whose function was to apply the law but not in theory

percent of the population, but cities were central in defining the political and legal authorities for their surrounding populations. Anderson recalls that after Louis XIV, and until the Revolution, no further rationalisation was pursued: “no uniform customs tariff, tax-system, legal code or local administration was ever created.” (1974: 108). The important change to the functioning of these institutions was the increasing sale of offices and the option of their hereditary upgrade with the *paulette* annual fee. This fundraising operation provoked the unparalleled rise of the *noblesse de robe* (robe nobility or office holding gentry).

In historiographical debates, the ‘revisionist’ turn seeks to uncover the social struggles operating behind the ‘grand ideas’, i.e. historical factors analysed by contemporaneous scholars and assumed by later historians to constitute the driving forces behind social change. Although not always explicitly, Absolutism, for example, was understood as the basis to the new regime ideology, glorifying and driving the capabilities of the state. Beik identifies two questions that have preoccupied historians, and three traditions of historical analysis: political/institutional, *Annalistes* and Marxist (1985: 3). Accordingly, the problem with historical studies up to the end of the 20th century was their separate focus on two distinct questions, political and economic, that essentially needed to be reunited in a critical analysis.

The first question concerns the role of the state in maintaining absolutism: how effective was Louis XIV’s rule? Political and institutional historians see the state and state-building as beneficial and external to society. However, more recent institutionalists have had to drastically temper that claim (Beik, 1985: 13; 17). The second question is the relationship between the state and society, in particular in relation to the sub-question of the transition from feudalism to capitalism. Social historians, or *Annalistes*¹⁰² chose to focus on land, demography, subsistence crises, climate and disease. Their work, in contrast, suffers from a lack of political dimension. The relation between state and society also preoccupied Marxist historians¹⁰³, but their debates either ignored the 17th century by focusing on revolutions and modernity, or mirrored claims made by ‘recent institutionalists’ (1985: 31). Additionally, they were marred in differentiating feudalism from absolutism and capitalism.

Building on Anderson’s work (1974), Beik applies the condition of extra-economic coercion to the definition of the absolutist regime, and thereby associates absolutism with feudalism. He argues the two questions separately preoccupying strands of historians – political and economic – need to be intertwined. In effect, Louis XIV’s success in ruling

create it (7 in *pays d'états*: Toulouse, Grenoble, Aix, Dijon, Douai, Rennes, Pau; 5 in *pays d'élections*: Paris, Rouen, Bordeaux, Besançon, Metz). *Présidiaux*, *sénéchaussées* and *baillages* were jurisdictions operating below the *Parlement* (*sénéchaussées* being the southern equivalent of *baillages*). The lowest judicial institution was the seigneurial court, of which 70,000 were counted in the mid-17th century.

¹⁰² The French journal *Les Annales*, founded by Marc Bloch and Lucien Febvre in 1929, became a school of thought later represented by historians such as Fernand Braudel and Emmanuel Le Roy Ladurie.

¹⁰³ See Shilliam (2009: 30-56) for a review of this literature in the context of early modern France and England.

France should be seen as directly related to the social relations of absolutism. Beik (2005) argues against the 'grand idea' that Louis XIV's reign was one of coordinated and advancing state-building in the face of the political, social and institutional remnants of feudal nobility and privileges. His critique focuses on the role and proceedings of regional *Parlements* and provincial class relations. He shows that Louis XIV had to collaborate with the nobility and new office holding gentry to maintain stability across the kingdom. In other words, the nobility did *not* simply acquiesce to Louis XIV's absolute rule, crushed by its overbearing *centralising* forces. Instead, three separate studies of the estates of Languedoc, of Brittany, Paris, Burgundy and Normandy, and lastly of Artois, 'Walloon' Flanders and Cambresis (Beik, 2005) reveal that regional elites and the state *collaborated* and mutually gained from their relationship. Moreover, the organisation of the army, so characteristic of 18th century France, had not overcome some of its traditional 'feudal' basic elements (for example, the funding of officers). These studies thus reject 'modernization' theories of the military element of the state (Beik, 2005: 217).

Parker (1989; 1996; 2003) also argues for a re-assessment of the 'absolute' character of the *Ancien Régime* as intrinsically feudal. His analysis of property rights under Louis XIV (2003) shows that strategies deployed by the king to claim territory or revenue on local landowners' territories (which they then replicated with their own vassals) remained in a feudal mode of rentier exploitation. Furthermore, the French regime differed from its English neighbour by stagnating in a re-definition of the ruling class as opposed in principle to the rising bourgeoisie:

"The development of individualism was also constrained by prevailing conceptions of hierarchy, lineage, family and property whose development owed as much to magistrates and lawyers as to grandees of ancient stock." (Parker, 1996: 270)

"The French nobility, ably supported by those aspiring to that status, thus succeeded in recreating a culture in which everybody knew their place and in renewing their own sense of purpose and identity." (*ibid*)

Parker therefore emphasises the assertion of patrimonial interests, deployed in defence of the privileged orders and hierarchical society. If the higher classes chose to stay away from local jurisdictions (i.e. the seigneurial courts over their tenants), this was in defence of the 'patrimonial nature of the legal system'. Either way, the courts were upholding neither the state, nor the higher nobility's interests, and therefore all remained trapped in their own interests¹⁰⁴.

¹⁰⁴ Miller (2008) continues the work of Beik and Parker by analysing 18th century French society. His focus on the organisation of social relations, how lords augmented or maintained their revenues and properties through the

In sum, the revisionist turn reveals the non-progressive character of French Absolutism. If it dovetails with early PM focused on this period (Wood, 1983; Comninel, 1987; 2000), and from which important implications for the history of IR have since been drawn (Rosenberg, 1994; Teschke, 2003; Lacher, 2006), this thesis agrees with Shilliam's regret that "the actual import and meaning of a non-capitalist French revolution for our understanding of modernity remains ill-defined." (2009: 31). In addition, Lesaffer (2008) notes how little this revolutionary and Napoleonic period has been studied in IL. Thus, to somewhat remedy these gaps in our understanding, the task here is to explore the implications of the above social history for the evolution of extraterritoriality as a legal strategy of expansion.

If dynastic absolutism was marred in a limited cycle of self-reproduction, characterised by personal forms of geopolitical accumulation, how are we to explain the continuing ideological legacy of the DPE as a founding model of exclusive and abstract territoriality? To explain this problem, this chapter unpacks from the Westphalia-DPE paradigm hidden processes of jurisdictional accumulation. It explores the hypothesis according to which keeping these processes hidden has contributed to mistakenly justify a linear, homogeneous and structural historiography, found in both Realist and Marxist studies.

The DPE, a Public Club of Private Politics

Events in France during the 17th century did not produce a school of French thought on IL, such as the Spanish neo-scholastics. French scholars had a more cavalier and technical interest in IL, in contrast to 16th and 17th century Spain, where the state and a collection of (either self-appointed or state commissioned) scholars, priests, *conquistadores* and settlers explicitly tackled issues of IL.

The following section argues that the European ruling classes used practices that isolated the development of European public law and thereby of a sovereign states system. They imposed a domestic-international duality that has since been reified by a presentist interpretation of doctrine, in effect stripped of contradictions and local specificities.

The next two sections will explain why these classes resorted to this isolation, faced with troubled and unruly internal social institutions on one hand (section three), and mercantilist and less organically ambitious overseas colonisations on the other (section four). These processes of jurisdictional accumulation, to be contrasted to those exercised by the Spaniards, remain functionally distinct from later forms of extraterritoriality developed by 19th century Britain.

judiciary, shows that 18th century elites were similar to their preceding generation and were connected to the monarchy through similar interests.

The Classical Doctrine of IL

Generally, Jean Bodin (1530-1596), Hugo Grotius (1583- 1645) and Thomas Hobbes (1588-1679) are considered to be the major doctrinal founders of the sovereign states system. Writing before the period of the DPE, they are seen to be its main influences. Bodin was a royalist and conceptualised state sovereignty as indivisible, perpetual and supreme, to counter claims from the Holy Roman Empire, the Papacy and feudal *seigneurs*. The state, sovereignty and the monarch were therefore conceptualised as one. Grotius was a natural law scholar, but was also substantially distinct from the Spanish theologians, though arguably not for the secularism of his approach¹⁰⁵. Thirdly, Grewe underlines the influence of Hobbes in the work of scholars of the French age¹⁰⁶. Many echoed his apprehension of a “severe crisis of the basic concept of the law of nations and of the belief in a binding international legal order”, “marking the point where the natural law tradition of scholastic theology was replaced by a systematically rationalistic system of natural law.” (2000: 349). Hobbes and even more so Spinoza (1632-1677) rejected the idea that natural law could be asserted above the sovereign monarch. Instead, they argued for a law of nature that prevailed *among* rulers (2000: 350), changing the notion of natural law by limiting its scope to the internal dynamics of kingship.

As there was no clear representative for a French theory of IL, Grewe identifies three schools of thought termed ‘natural law’, ‘positivist’ and ‘synthetic’. The scholars concerned¹⁰⁷, of whom Vattel (1714-1767) has been most celebrated, oscillated between northern European universities and monarchs’ Courts such as Vienna or Stockholm, providing these with tools to assert their political identity, and strengthening the ties between doctrine and state practices.

However, it has already cogently been argued that such narratives abstract scholars’ meanings from their social context in order to present a logical and progressive account of modern disciplines, even by scholars outside the ‘critical’ tradition¹⁰⁸. This section will thus

¹⁰⁵ Boucher (2010), for example, disputes this assumption of secularism, and claims that Grotius, with other natural rights thinkers up to the early 18th century, still tied the obligation to obey the natural law to God.

¹⁰⁶ Wood (1983: 288) also notes the fact that Hobbes, an exception amongst English thinkers of the time, spent many years in France and was closely associated with French thinkers.

¹⁰⁷ The natural law tendency headed by Pufendorf (1632-1694) followed Hobbes’ conception of the state of nature between nations, although for the former this constituted a state of peace (Grewe, 2000: 354). The positivist school can be represented by Zouche (1590-1660), and opposed the above identification of the law of nations with natural law (*ibid*: 355). Zouche based his rationalistic ideas on custom as the consent and reason of State, and on treaties (*ibid*: 356). Other known protagonists were Rachel (1628-1691), Textor (1638-1701), von Bynkershoek (1673-1743) and Moser (1701-1785). The last school of thought was one inspired by Grotius, also referred to as the ‘synthetic’ conception of the law of nations. It encompassed thinkers such as Leibniz (1646-1716), Wolff (1679-1754) and de Vattel (1714-1767), but also Dumont (1667-1727) and von Martens (1756-1822).

¹⁰⁸ The Cambridge school headed by Skinner (1969; 1978a; 1978b) has developed a strong critique of this type of history. Similarly, see Tuck (1999) for a different interpretation of the above-mentioned scholars, and Jahn (2000; 2006) for studies of classical thought and IR theory. From a more conventional account: “Until recently, the historiography on the early modern law of nations from the sixteenth to 18th centuries has been determined, if not

focus on how such accounts also sideline contemporaneous scholars and practitioners in relation to ideas and practices of jurisdictional accumulation. For example, Morin (2010: 12-22) provides an original analysis of French jurists and lawyers' views on colonial practices.¹⁰⁹ He notes that Grotius and other illustrious writers of the law of nations were blacklisted by French lawyers, despite Richelieu's attempts at widely diffusing these works for their legitimating of colonial expansion (Morin, 2010: 4).

Moreover, Belissa (1998) makes a strong case for reviving an essential ideological and political aspect of 18th century thought on the law of nations that Grewe ignores. Belissa shows that the common Bodin-Grotius-Vattel narrative omits the constitutional approach to the '*droit des gens*' taken by Enlightenment thought, criticising and offering itself as an alternative to the personal, dynastic European 'public' law seen as oppressing the peoples of Europe. Consequently, the public space of nations, which philosophers deemed desirable, and the private order of kings were considered separate and irreconcilable projects. For Belissa (1998: 91), this can be interpreted as a dialectical contradiction defining the French age. The natural law principles elaborated by Enlightenment philosophy focused on the need to differentiate the public law of nations as a '*droit des gens*' from the growing treaty-based inter-sovereign law of nations (DPE). These principles, he argues, were strongly present in the thought and strategies of the state's political actors (1998: 120). Finally, Belissa (1998: 12) notes the changing meaning of the term 'political': for Enlightenment thinkers and revolutionaries, '*le politique*' referred to the ensemble of global legal relations between men, and within one kingdom or principality, including the natural law moral aspect (except, as he notes, for 'Machiavellians'). The sense of 'political' as strictly pertaining to relations between states only progressively appears after the Revolutionary era, and should be attributed to dynastic practices, rather than doctrinal or philosophical debates.

In addition, significant doctrinal influence should be attributed to the Protestant North through Humanist scholars and universities (Keene, 2009) and the spread of the Calvinist 'disciplinary revolution' (Gorski, 2003). These resulted in the ascendancy of a nationalising and centralising impulse over natural law-Enlightenment ideals. While diplomacy became imbued with dynasticism, i.e. personal representation through ceremonial, competitive ranking and military-aristocratic habits, the doctrine of IL moved towards a comparative, technical, treaty-based method dominated by Protestant universities and Northern European scholars.

Thus, this alternative research corroborates the argument that the DPE was a socially distinct and exclusive phenomenon in the history of IL doctrine. Far from producing

suffocated, by the positivistic views of some nineteenth-twentieth century international lawyers on their own times and by that era's consecration of the sovereign State." (Lesaffer, 2002: 109).

¹⁰⁹ He analyses the works of, amongst others, Bodin, Jean Bacquet, Pierre Bergeron, Claude Fleury, Cardin Le Bret, Guyot, Charles Loyseau, and Jean Domat.

consensus, it was also ignored and strongly contested; its centrality is falsely assumed by a writing of the history of IL based on rational state-building and successive hegemonic eras. Consequently, a specific doctrine has been overly emphasised to construct a picture of homogeneous and progressive state formation. In a similar way to how it is used posthumously to construct IR theory, notably with the concept of the state of nature (Jahn, 2000), classical legal thought is also reinterpreted to legitimate the inevitability and hegemony of European forms of sovereignty through assumptions of 'Westphalian' legal abstraction and exclusivity. This was particularly important for colonial enterprises throughout the different imperialist phases, but particularly for the more coercive and transformative 19th century era. Moreover, this narrative remains strong in analyses of extraterritoriality, as Raustiala's brief account of early modern history shows (2009: 8-30). This helps him to justify an intrinsic functional logic behind different forms of extraterritoriality, from the institution of permanent embassies in the 17th century up to contemporary American practices of legal hegemony. This leads to a naturalising of such processes as conditional to modernity, and structurally separated from class interests. We will now see how, in fact, class interests are at the heart of, in this case, early modern structures of IL.

Inter-dynastic Practices

The Westphalian era effectively saw the increase and entrenchment of diplomacy and state/monarch sovereignty as markers of legitimate international relations. Historians of IL have started to incorporate studies on the myth of Westphalia. For example, Lesaffer concludes, "the Westphalia Peace Treaties did not lay down the basic principles of the modern law of nations; they did, however, lay down the political and religious conditions for allowing the European powers to start building a new international legal order." (2004: 104). More specifically, treaties between princes were first of all private contracts, emphasising their personal character notably by the process of 'co-ratification' by prominent subjects (Lesaffer, 2002: 117). However, the conclusions contemporary scholars draw from critical histories of Westphalia remain limited. For Lesaffer, the era of private contracts ended in the early 16th century. The 1540s saw the accomplishment of external sovereignty (decline of pope and emperor), while internal sovereignty followed a century later. He explains the 'backward' movement from the universalism of medieval *ius gentium* to the European law of nations by the need of custom and state practice to reassert itself on an international scene without juridical framework, i.e. after the loss of canon law's 'geopolitical' hegemony (*ibid*: 119). This explains the turn to treaties, mostly bilateral up until 1713 (Treaty of Utrecht). Thus, similarly to Grewe, the analysis remains focused on the succession of international legal orders.

Lesaffer qualifies the French age from the late 17th to late 18th centuries as *modern*¹¹⁰, in the sense that it abstracted and rationalised the state and its external practices, thereby overtaking personal and dynastic sovereign rights (2002: 128-136). He concludes by stressing the dual character of sovereignty, which amounts to a definition of anarchy conventionally found in IR theory: “On the one hand, a system based on a very far-reaching concept of State sovereignty was construed. On the other hand, paradoxically, the very construction of such a *system* limited the sovereignty of the States it was based upon.” (*ibid*: 136). From this, Raustiala, for example, deduces the functional logic of extraterritoriality, as a necessary manifestation of the *limits* of the state system.

However, the extent to which these processes were abstracted, so as to become lasting structures of modern politics, is contested. For example, sovereign rulers used their growing ‘external’ sovereignty to legitimate their position as a group and define their rank amongst themselves (Keene, 2010), but also to muzzle problems that slowly became identified as ‘domestic’. The importance of dynastic family ties is a primary condition of this European *entente* or balance of power. Moreover, the proliferation of treaties was essential for the standardisation of rule, perpetuating sovereigns’ personal and hereditary hold on government by *legally* (i.e. formally, not substantially) abstracting and rationalising the state as a public body. This created an imaginary society of states rather than individuals (or more exactly Christian or Catholic individuals, as in the case during the *ius gentium* and *ius inter gentes* eras). Furthermore, collaboration between the state monarch and magistrates, as well as the ensuing static condition of the ruling class, were essential structural factors, as professionals and experts started to replace sovereigns and the aristocratic ruling class during negotiations (*ibid*: 51-52). Thus, effective change was the product of shifts in individual and social relations rather than institutions. Finally, it is important to recall that the ruling dynasties tried to influence legal systems *contra* philosophical and social trends.

“In contrast with the more abstract, rationalist approach of the natural lawyers and the *philosophes*, this literature [on the law of nations developing since the mid-seventeenth century] was based on the empirical analysis of treaties: a typical work would present a collection of the texts of some important agreements, with a commentary on the negotiation process that had led to them and an analysis of the implications of their provisions for the rights and duties of individual rulers. With only a few exceptions, the treaties in question had been made by dynastic rulers, and usually involved the transfer of specific prerogatives from one family to another. They thus served the counter-revolutionary purpose well in so far as they trapped France, like other states, in a restraining web of treaty obligations, while reinforcing the claim that European public order as a whole rested on the

¹¹⁰ Thus, “the continuity between the modern era and the twentieth century seems to be greater than is normally accepted.” (Lesaffer, 2002: 137)

principle of respect for the lawful rights of dynastic rulers codified in the treaties.” (Keene, 2002: 17-18)

Thus, instead of seeing France as the model of an emerging rational state at the origin of the sovereign states system, this system was established to counter French ascendancy. Dynastic rulers, helped by sympathetic scholars¹¹¹, used legal practices to *anticipate* threats to their international order, and thereby limited the outward impact of local dynamics and struggles (Gorski, 2003; Nexon, 2009; Belissa, 1998). 17th to 18th century European states did not form a ‘whole’, as von Martens for example argued (van Blom, 2008), which the emerging practices of IL naturally bounded to form a European society. Instead, these practices were political means and techniques developed to cement the rule of dynastic rulers, against revolutions and threatening hegemonies in England and France, growing legal professions and Enlightenment ideals.

In short, the rational, exclusive and abstract structure of the sovereign state forming during the Westphalian-DPE era is an illusion that is maintained by a formal legal distinction between internal and external realms of legitimacy, fought for by dynastic classes. This history puts to the side events in local, regional and larger geopolitical settings, which form instead an overlapping and heterogeneous patchwork of processes of jurisdictional accumulation.

Jurisdictional Accumulation: Public Law and French Sovereignty

To further counter the homogeneous picture of the DPE, the following will present three important ideological positions fighting to shape French sovereignty, which enrich and contextualise the role of ‘grand’ thinkers and ideological conflicts in the history of IL. These constitute part of the first reason why French absolutist rulers turned to their European counterparts to assert their sovereignty by mutual competition and by erecting a ‘public’ space of private foreign policy. The second part consists in the specific character of French legal orders and their powerful role as negotiators with the monarchy.

Debates

The first crucial ideological position, strongly implanted across France, was that of the absolutists or royalists. As an eminent representative of this position, Bodin’s aim was to transfer “particularistic, quasi-feudal powers to the monarchy” (Wood, 1983: 295), and to

¹¹¹ The role of Grotius’s *Mare Liberum* (1609) in helping the Dutch East India Company is a well documented fact (e.g. Borschberg, 2005).

ensure that the “unity of the state and the ‘harmonious’ balance of its constituent parts were expressed in and maintained by the sovereign power of the king” (*ibid*: 292). Wood stresses that this was not meant to transform society in order to eliminate the system of corporate estates. The issue was rather one of harmonisation between the monarchy and the ruling classes, and for sovereignty to embody the unity necessary for their collaboration. Wood’s arguments on the tension found in Bodin between feudal corporatism and a centralising state chime with Beik’s conclusions on the collaboration between the monarchy and provincial elites (2005). Wood cites Jean de Bourg (judge and representative of the third estate) as an example of the position taken by provincial lawyers in the procedure of the *cahiers*. His wishes came down to the “defence of corporate balance among estates, especially with regard to taxation, based on the organic unity and harmony of the social order” (Wood, 1983: 290), thereby also defending the interests of the urban bourgeoisie.

In opposition to Bodin and his harmonisation of the state-sovereignty-monarch triptych, Huguenot constitutionalists¹¹² formed during the French religious wars of the late 16th century. They were more intent in defending the rights of the people, although they argued these rights should still belong in practice to corporate bodies. The resistance to royal absolutism was preached through the asserted “authority of the Estates to control the two major ‘public’ functions which lay at the heart of many grievances, the apportionment of taxes and the distribution of offices” (Wood, 1983: 293). The opposition with absolutists such as De Bourg consisted not in defending private interests against the public body, but in reversing the relationship of the unitary king and its multiple people (*ibid*), and thereby reversing the origin of sovereignty. The issue in French political debates was the definition of the public. In other words, who gives sovereignty to whom: the king or the people? These problems reflect the contested and ambiguous relationship of the private and public functions of the state, as one of the resistance tracts of a Huguenot records: “Does the King, then, have private property in the royal, or public, patrimony? (...) Let me ask, furthermore, whether royal status is a possession whereby the people, who conferred it, retain the proprietary right?” (*ibid*: 294). Rousseau was ultimately too radical for even Huguenot constitutionalists, who according to Wood, never went as far as transferring legislative powers to representative assemblies (*ibid*: 306). However, his concepts of sovereignty, government and general will are deployed in an analogous way as it is the people, in their multiple public form, that confer sovereignty to the state. Similarly, he rejects the household/state analogy that pervades political economy and perpetuates the private character of the state. Rather than securing sovereignty in the person of the king (as with Bodin), Rousseau chooses the principle of the

¹¹² Also known as ‘*Monarchomachs*’ (those who fight against monarchs) and identified as the first Calvinists to transform the concept of religious duty to resist, into a ‘modern’ political and moral right of resistance (Skinner, 1978a: 240).

‘general will’: thus, sovereignty emanates from the community so as to keep rulers in check. “In a sense, where Bodin subordinates the particularity of the people to the universality of the ruler, Rousseau subordinates the particularity of the ruler to the universality of the people.” (*ibid.*: 305).

Next to these two opposing discourses, Jansenism was also a strong influence. For Gerstenberger, it even constituted the most serious challenge to ruling practice (2007: 496). It consisted of a Catholic movement arising out of the Counter-Reformation causing controversy and condemnation by the Pope, but attracting important French theologians and writers such as Blaise Pascal and Jean Racine. Their main influence was St Augustin. Jansenists’s opponents were the Jesuits, and this conflict highlights the importance of religious divisions on the political scene. A recent surge of research in early modern history is emphasising the dynamic of the Protestant Reformation (Gorski, 2003; Nexon, 2009). This dynamic can be linked to the rise of an educated anti-nobility class as an essential component of the pre-Revolutionary social conflicts (Gerstenberger, 2007: 498-500). Jansenism is particularly important in our case as it attracted magistrates and was often defended by the *Parlement de Paris*: “magistrates seeking to prevent the Crown and the upper clergy from eradicating the Jansenist current within the church publicized the threat of ‘despotism’, the monarchy’s duty to adhere to ‘fundamental laws’, and even the concept of national sovereignty.” (Miller, 2008: 5). Moreover, Jansenist barristers or *avocats* conceived of France as a ‘judicial monarchy’, according to Bell (1994: 17). This status of ‘judicial monarchy’ is justified by the particular role of *parlements* as organs of royal government (*ibid.*: 24) and by the impact of legal complexity and ambiguity on the society of the *Ancien Régime*, to which we will now turn.

Legal Orders

Though the development of the legal profession is one of the main innovations of the *Ancien Régime*, its role is heterogeneous and served to maintain absolutism as much as it tried to resist or contest it. For example, Krynen (2009: 63) asserts that if the *Parlement*’s role was irreplaceable in establishing royal sovereignty, the monarchy also had growing difficulties in its dealings with *Parlementaires*. We saw in the first section the complex administrative division of the territory associated with France¹¹³. In the northern regions above the Loire, up until the end of the *Ancien Régime*, existed sixty-five general customs and three hundred local customs; neither was the south (*Midi*) a uniform legal space, despite its ‘written law’ tradition (Krynen, 2009: 56). Notably, the difference between *pays d’états* and

¹¹³ Moreover, it must not be forgotten that territory in the *Ancien Régime* was not understood as it is today, i.e. as fixed and exclusive. See Ruggie (1993) and Anderson (1993: 96-102).

pays d'élections is important to understand the power differentials between different seats of *parlements* and local seigneurial courts, as the former maintained 'higher levels of indirect rule' and 'more heterogeneous bargains with central authorities' (Nexon, 2009: 72-73). "The stakes were high, since the dimensions of a jurisdiction determined, in fairly direct measure, the amount of an official's revenue, the value of his office, and even the extent of his honor, measured quite tangibly by his rank in public processions." (Bell, 1994: 22). Moreover, in some areas justice and fief were still in practice tied together under the pressure of patrimonial rights, despite theoretical attempts to separate them. Even when looking at the differences between northern and southern jurists (the first assumed to be feudalists, and the second more influenced by Roman law), it appears that both "developed a jurisprudence that reflected the economic interests of the feudal-rentier class to which they – and the monarchy – belonged." (Parker, 2003: 93).

An essential difference to note in the making of the legal profession is that between *Parlementaires* and advocates or barristers (*avocats*). *Parlementaires* were the judges of the *Parlements* and became 'the most prominent robe nobles'. Their influence was felt mostly in three areas. First, they belonged to important families with strong connections in government and finance, thereby affecting the older sword nobility and politics of state. Second, they issued *arrêts* (decrees) for the implementation of laws and the maintenance of public order, thereby competing with other administrative authorities (governor or *intendant*). Lastly, *Parlementaires* had the capacity to affect the king's legislation by delaying the registration of edicts or ordinances, or by petitioning the king for changes (Beik, 2000: 8).

Avocats or advocates are represented as 'institutional technicians' (Bell, 1994). Breen (2007) uses events in Dijon in 1627 to 'highlight the importance of university-educated legal professionals, known as *avocats*, in their role as local *hommes politiques*.' "They were the recognized experts of France's complex and multifaceted body of law, masters of arcane legal precedents and principles. They were highly knowledgeable about the workings of the various judicial institutions and privileged corporate bodies that made up the state's governing apparatus." (Breen, 2007: 3) Breen argues that a symbiosis was formed between the *mairie* (town hall) and bar of Dijon. As advocates were excluded from royal sovereign courts by the price of offices, they turned to the municipalities.

The rise of the robe nobility and of office venality had advantages and disadvantages for the state and monarchy. This practice consisted of the private selling of public offices but also the sale of honours and special privileges (taxes, industrial monopolies, trade and rights to a specific profession), at times resulting in the ennoblement of the buyer and his descendants¹¹⁴. It affected all functions of society (state, monarchy, administration, army,

¹¹⁴ In total, there existed between three and four thousand offices that conferred nobility, added to thousands of other posts that did not (Beik, 2000: 9).

legal system) thereby constituting a new form of property. This practice is thus at the heart of the non-bureaucratic, personalised, patrimonial and divided characteristics of the *Ancien Régime* (Teschke, 2003: 126 et 173-177). Beik notes that if this meant a “whole new body of individuals whose fundamental interests lay on the side of the state” and the “tapping of their wealth coming from commerce or finance” (2000: 7), the state nevertheless lost an opportunity to develop productive business. This new group added to the under-taxed privileged elite, “creating a collegial body of virtually irremovable, powerful figures who might well defend their own interests, even when these clash with royal policies” (*ibid*). However, the situation of the *Parlementaires* also shows strong signs of collaboration between king and judges, in terms of the security and establishment of their status and property (Beik, 2005: 220). These varied dynamics towards the monarchy, alongside those of provincial elites and office-holding gentry, are therefore difficult to homogenise, especially as the short-term royal manoeuvres to control these different groups only created more chaos and uncertainty in the long run.

From the 13th century onwards, the king personified legislative sovereignty as the distributor of justice (Krynen, 2009: 17-38). This role represented the potential centralisation of territory, making this function a glorified and pursued agenda by royalists. The realisation of this potential and transition to lawmaker is generally associated with absolutism, but this assumption is now contested by the lack of legal uniformity and the class dynamics of patronage and ensuing clientelism following from office venality (Teschke, 2003: 179-181). From the 16th century, if the monarchy had the title of supreme legislator and produced a ‘steady stream of ordinances’, it was the role of the *Parlement* to register the law and give it force. Van Caenegem (1987: 70) also stresses the role of jurists and jurisprudence in shaping the legal landscape. For this last author, the specificity of the French legal system was its ‘peculiar state of equilibrium’ between the judiciary, legislature and scholars. Moreover, the king remained hierarchically beneath God. He derived his power and therefore his legislative sovereignty from divine authority (Parker, 1989; Krynen, 2009: 31-38).

It can be argued, then, that next to the practical limits on absolutist rule from diverse social groups, the King was also interpreted by political thought as dependent on the will of God. This, and other studies of the *Parlementaires* as a powerful resisting *and* collaborating force for the monarchy, confirms theories of the non-evolutionary stage of French Absolutism, stuck in between too many contending forces. Most of these forces clashed over theories and practices of jurisdictional accumulation, i.e. who determined, sanctioned and regulated claims to jurisdiction. Pre-revolutionary France was, to say the least, a society in transition, and jurisdictional rights were thus at the heart of social and political life.

Thus, doctrine and practice remained in a constant dialogue with regional and local social struggles. Though intentionally sidelined by the monarchy, the evolving French legal

orders kept a link to matters of foreign policy and treaty making. This manifested itself mainly through the role of the *Parlement de Paris* in maintaining a presence or an ability to control certain royal acts. Moreover, the role of the *Parlement* in foreign policy became more and more a matter of debate in the 18th century (Gerstenberger, 2007: 509-510; Belissa, 1998: 117, 184-191; Durchhardt, 2004¹¹⁵), while foreign policy and the *droit des gens* was increasingly discussed in political literature such as the *Gazette de Leyde*: “Alongside reports of the royal family and the court, there was now reference to social tensions, to differing views among government officials, and to the mistakes of foreign monarchs” (Gerstenberger, 2007: 504; see also Belissa, 1998: 124).

The *Parlementaires* and advocates’ role in the French revolution is an important question, though it cannot be adequately investigated here. For Miller, focused on the 18th century, “the political body responsible for the transformation of the country between 1789 and 1791 was composed of lawyers and officeholders, not merchants and industrialists.” (2008: 4). But ties were also generally found between law schools, the growing bourgeoisie and office holding gentry, resulting in the judiciary playing a strong part in defending and augmenting the revenues of lords: “Royal institutions and laws anchored the country to its feudal past.” (Miller, 2008: 24). The debates and opposite dynamics point to a complex, influential and overlapping legal system. Furthermore, even if the revolution abolished the old system¹¹⁶ and has since constituted the dividing line between the history of law (*l’histoire du droit*) and modern, actual law (*le droit*), van Caenegem (2002) argues that post-revolution, the break from the past was not so stark in practice and more difficult to put in place than is commonly assumed.

Still, when compared to the formation of public law in France (where the monarchy had to collaborate with a mixture of old and new, feudal and Roman legal codes, but also networks of *Parlementaires* and politically ascending advocates), the isolation of European practices and their consequent assertion of state rulers had a strong impact on post-revolutionary France. The strong political power and determination of legal institutions and legal training, present before the Revolution, waned under the pressure of a European order of states that curtailed and ‘boxed in’ the ideological and practical potential of social movements. Although the new regime, with its civil codes and rejection of old and patrimonial

¹¹⁵ “that the regional or national estates or – in the case of France – the Parisian Parliament were excluded from international relations in the quality of signatories of international treaties did not, by the way, mean that they disappeared completely from the treaties’ texts.” (Durchhardt, 2004: 47).

¹¹⁶ “In France, one of the first acts of the first revolutionary assembly was to abolish almost all the legal institutions of the ancien régime, including the orders of advocates, to create new decentralized and deprofessionalized system of courts, and to begin the task of simplifying and rewriting the law for the new legal order they had created. (...) While Napoléon had little sympathy for lay justice, he had none for advocates and he also had his own political reasons for keeping them unorganized and powerless. He therefore reconstructed legal institutions without making any provision for orders of advocates. After repeated attempts, he was finally persuaded, in 1810, to allow them to reconstitute their old orders, though he was careful to place them under tight state control.” (Burrage, 2006: 581).

jurisdictions, contained promises of Enlightenment ideals of justice and popular sovereignty, it also administered and neutralised political and judicial strongholds that would have resisted the new governments.

To conclude on this section, it follows that a history of IL based on generalising 'external similarities' according to the criterion of a territorially fixed, rational and/or mercantilist state is unsatisfactory. This is due to the multiplicity and variation of political and legal debates in France, but mostly its complex, powerful and compromised set of regional and royal institutions. Even though the state and king's strategy was to distance foreign affairs from those of the realm, this was always a contested and continuous struggle.

However, this aspect is only one part of the explanation for the isolation of the DPE as a public-private sphere. The following section will now look at jurisdictional accumulation played out in colonial settings.

Overseas Jurisdictional Accumulation

This final section will address how the social property relations of the French colonial regimes reveal a mixed pattern of experiments in sovereignty based in struggles between local and mercantilist interests. These practices differed substantially from Spanish overseas endeavours. However, the polities they generated should also be distinguished from subsequent 19th century European conceptions of colonial sovereignty such as extraterritoriality. Recent historical research focusing on the development of IL and colonialism highlights the specificity and variegated nature of colonial sovereignty, instituting at times a semi-feudal regime and institutions exported from *Ancien Régime* France, and at others experimenting with legal innovations otherwise fettered by it (Fisch, 1988; Green & Dickason, 1989; Keene, 2002; Benton, 2002; Anghie, 2005; Morin, 2010). It is not possible to look in detail here at the many forms of colonial sovereignties; rather, the point is to stress the heterogeneity of processes of jurisdictional accumulation, and the impact of historiography's neglect in incorporating these processes into theories of the construction of states and international legal orders.

Firstly, the debate on mercantilism will be briefly addressed, before looking in a second instance at colonial property relations and territorial settlement as legal strategies of expansion. Lastly, the issue of trading companies as growing subjects of IL will be introduced as exemplary of the legal complexity and variation in forms of sovereignty.

Mercantilism and Commodity Capital

For Grewe, mercantilism¹¹⁷ is defined as the overseas counterpart of the European balance of power: “In Europe, States fought over people and territories. Overseas they fought over trade, navigation and the colonial fortunes which formed the principal object of their rivalries and struggles” (2000: 295). Mercantilism generated the formation of the “legal institutions serving colonial expansion and political and economic methods of colonial policy” (2000: 296). He associates it with Colbertism¹¹⁸, nationalism, colonial monopolies, effective control of trade and maritime police (instead of exclusive and sovereign rights over the oceans) and trading companies. Mercantilism’s particularity was the way in which states negotiated with traders, a strategy not deployed on their European territories.

Teschke defines mercantilism as “private ownership and accumulation of state-sponsored titles to wealth for the mutual benefit of king and privileged traders and manufacturers” (2003: 209). Collaboration between the ruling classes, characteristic of absolutism, thus played an important part in strengthening mercantilist policies. Moreover, mercantilism can in this light be interpreted as the worldwide extension of absolutist Europe: “Commercial capitalism under dynastic conditions was a geographical strategy of extending the accumulating reach of pre-modern states, not a qualitative change in the logic of world order” (2003: 204). Mercantilism is understood here as a pre-capitalist process based on the internal and external accumulation of surplus by political means (i.e. coercion of direct producers or unequal exchange) (*ibid*: 210), which on its own was not a sufficient factor to develop capitalist property relations¹¹⁹. However, this strong political aspect also partly explains the strong assumption between (international) law and mercantilist policies, notably emphasised by Miéville as a critique of the PM account of the transition to capitalism (2005: 203).

From the present research, it is argued here that mercantilism was not the favoured option for increasing the power and prestige of the French state. This would have meant encouraging the cities and the urban bourgeoisie, which the governance of Louis XIV preferred to take advantage of by taxes, and stifle by the selling of offices and the lucrative option of royal finance (Beik, 2000: 14). Moreover, certain mercantilist practices became instances of jurisdictional accumulation beyond the control of the French state, such as those involving trading companies and instances of collaboration with local rulers. Hence, mercantilism is inadequate in itself to define the universalisation of IL in this era. Instead, it

¹¹⁷ See chapter two for a discussion of Miéville’s definition of mercantilism.

¹¹⁸ Colbert (1619-1683) was Louis XIV’s finance minister and developed manufacture, commerce and tax raising to deal with the monarchy’s debts. Colbertism is loosely associated with protectionism, and contrasted to the British model of free trade advocated by Adam Smith (1952).

¹¹⁹ For an exposition of the difference between merchant’s capital and industrial capital, see ‘Chapter XX Historical facts about merchant’s capital’ (Marx, 1959: 323-337). Marx argues that if mercantilism is a historical premise to the development of capitalist production, it remains merely an ‘agent’, “incapable by itself of promoting and explaining the transition from one mode of production to another.” (*ibid*: 327)

should be understood differently as an ensemble of overseas practices of jurisdictional accumulation.

Colonial Property Relations and Territorial Settlement

The main point that emerges out of recent historiography is the divided, unfixed and composite character of sovereignty in the absolutist era. Colonial entities, *a fortiori*, vary according to the different strategies employed by the French monarchy and the particular prerogatives of the companies put in place to govern. Morin (2010: 69) argues that the general policy towards indigenous peoples in North America was to consider them independent, in a certain sense 'free', and able in certain circumstances to remain under the jurisdiction of their own laws and customs. Legal regimes varied according to the status and conditions of settlement of the people in question, and there was a large amount of often complex treaties signed between the monarchy and indigenous populations. He stresses the fact that French law was not imposed on them: for one, because such a thing barely existed in a homogeneous form; but also because this was a safe strategy for the monarchy to keep a hold on the territory in question and its resources (e.g. the fur trade). In other words, it could not maintain its colonial empire without the help of local warriors and traders. This situation is particular to 'Nouvelle-France' (mainly territory now in Canada), as colonies in Louisiana and in the Caribbean encouraged emigration and thereby territorial settlements. Morin's analysis points to the non-modern, i.e. neither exclusive nor abstract nature of the *Ancien Régime's* colonial policies, and therefore of mercantilism, in that it permitted fluid, semi-feudal and innovating legal systems. In contrast, the early 19th century brings a much more pronounced, i.e. categorical and authoritarian system of colonial rule, notably driven by Britain rather than France.

"La Conquête de 1760 permettra aux Britanniques de tirer pleinement parti des ambiguïtés de ce régime, qui n'était pas fondamentalement différent de celui qu'ils ont mis en place dans leurs propres colonies. De virtuelle qu'elle était, la souveraineté pourra alors devenir effective, au terme d'un long processus qui ne fait alors que débiter."¹²⁰ (Morin, 2010: 70)

Concerning territorial settlements in the American colonies, the private rights of individuals were being "deepened and extended through the increasingly normal practice of granting tenures under free and easy terms" (Keene, 2002: 68), instead of being vested in the state. "On the contrary we see the profusion of divided sovereignty, re-cast in the form of

¹²⁰ Personal translation: "The Conquest of 1760 will enable the British to fully take advantage of the French colonial system's ambiguities, which in fact differed little from their own. From being merely virtual, sovereignty becomes effective [exclusive] after a long process which at that point is only beginning."

decentralised systems of colonial governance, [rather than the consolidation of public authority in the hands of the holders of territorial sovereignty]" (2002: 69).

Indeed, Keene notes that sovereignty was extremely divided and in effect difficult to localise, i.e. it was not territorial. In North America, it was distributed between the Crown, proprietary agencies and settlers' local institutions, while the regime of distribution varied across the country. In the East Indies, the division of sovereignty was also an essential part of imperial policy, and was distributed between European governments, imperial administrators and indigenous rulers. In this case again, only the early 19th century saw the development of the Europeans' civilising mission in the region. This meant they took more and more part in controlling governance and in reorganising property systems. Thus, the division of sovereignty in this case was a preliminary means to the concrete end of restructuring individuals' relationship to the land, thereby transforming their society at the root level. However, this was a different process of accumulation than that developed in the era of French colonialism. It coincided with the 19th century and the period of 'productive' capitalism. Early modern French colonialism was not characterized by the full imposition of state or monarchical sovereignty. Instead, early modern mercantilism and imperialism diffused a mixed and confused model of domestic rule, which resulted in different forms of jurisdictional accumulation. The plethora of divided and composite colonial sovereignties was taken over more forcefully, militarily and juridically, by 19th century imperialism. In other words, mercantilism can be associated with these processes of jurisdictional accumulation, which exported and imposed different institutional forms but did not lead by themselves to a transformation of the relations of production.

Trading Companies

Trading companies provided the "organisational and legal forms by which colonial territories were politically and economically attached to the parent country" (Grewé, 2000: 298). They appeared in the 16th, flourished in the 17th and declined in the 18th centuries (2000: 299). French colonisation heavily relied on trading companies: seventy-five French companies existed between 1599 and 1789 albeit not with a great lasting importance. In the English and Dutch cases, the situation was different. "They were artificial products of a clearly conceived political will of State. They lacked the private, individualistic spirit of enterprise and adventure", which was significant in other companies and in earlier French initiatives (*ibid*: 301). A common point between English, French and Dutch governments is

that they all used trading companies as direct representatives of the Crown and delegated to them sovereign powers. “Over time the companies succeeded in establishing themselves as equal partners in negotiations [with Indian princes] and gaining the power to send and receive envoys and to be respected as sovereign rulers” (*ibid*: 301-302). It then became a “matter of controversy in international legal theory during the 19th century whether the great trading companies were ‘subjects’ of international law” (*ibid*: 302), which showcases the contradictions between the 19th century legal order and that of the absolutist era.

States indeed accorded them a vast array of rights. On the one hand, a trading company enjoyed a “monopoly on trade with, and full legislative, administrative and juridical authority over, all inhabitants of the lands assigned to it” (Grewe, 2000: 303). This applied, more or less, to most French, English and Dutch companies. On the other hand, they also enjoyed the right to decide on matters of war and peace, concerning inhabitants and trading companies of other States, thereby extending the balance of power overseas (although usually they became preludes to wars in Europe). “The specific function of the companies in this age was characterised by the fact that they could wage colonial and naval wars with one another without disturbing the general peace in Europe” (*ibid*: 303)

What is striking for this case is the explicit confusion between public and private spheres of influence and legitimacy, which is crucial for the central argument concerning the delimitation of the DPE as a private-public space of dynastic politics. According to Grewe, trading companies took a “semi-State, semi-private intermediate position”, making it “possible to avoid a complete transfer to the overseas colonial sphere of the European concept of State, with all its far-reaching legal consequences and associated concepts of sovereignty, nation-State, State territory and State borders” (Grewe, 2000: 298). This thereby marked the development of a “separate, flexible system of a colonial law of nations” that “required different standards” (*ibid*). Grewe emphasises the fact that by the 18th century the concept of ‘state’ was established: “[The trading companies] very function was to prevent the transfer of the concept of ‘State’ to the non-European world.” (*ibid*: 302). This resulted in making the colonies only able to enter the future international society of nations as half-admitted members, with duties but no rights (Bowden, 2005). Grewe assumes that this ‘semi-State, semi-private’ condition was not a direct import from Europe, but a *half-import* of the modern attributes Europe was to by that time have mastered, i.e. legislative sovereignty, nationality and fixed territoriality. Grewe interprets this as an intentional strategy of the European states to differentiate themselves from the rest of the world, but this ignores the difference and struggles between ruling classes, monarchs and growing bourgeois professions in the state apparatus, and crucially, how these differences and struggles were also played out geopolitically through trading companies, for example. Instead, it was because European states were faced with the complexity of their own systems when trying to

export them, that they resorted to inter-dynastic practices of 'privately' isolating the European 'public' space.

Moreover, since European states did not possess attributes of exclusive and abstract state sovereignty, trading companies could only be attributed a vague and vast status in relation to the states' private/public conflation. As shown by Morin (2010), this was also an unavoidable strategy, considering the heterogeneity of law in France and the political strength of indigenous communities. Absolutist states and trading companies were linked as an alliance between European monarchies and 'their privileged merchants-manufacturers' (Teschke, 2003: 203). As mercantilism "extended the pre-modern logic of absolutist territorial organization into the non-European world." (*ibid*: 204), trading companies were the means through which this was accomplished, providing the link between *de facto* and *de jure* legitimate rule. Once more, Grewe's analysis ignores the role of class and contested property relations, this time in the conquered territories, and thereby misses crucial specificities of the history of IL.

Conclusion

The problem this chapter elucidated is how dynastic private family law was able to 'elevate' or transform itself into 'European public law', and create the illusion of a new and original consolidated system of exclusive and abstract states, while absolutist monarchs and dynastic ruling classes remained in a non-developmental mode of reproduction.

Looking at current debates on European legal history in the 17th and 18th centuries and the dominant role of France, the aim was to contest the assumptions of a progressive, linear and structural development of the sovereign states system founded on the assumption of French Absolutism as the emergence of an abstract and rational state.

In an attempt to build a richer social history of practices of IL, this chapter focused on the following questions: was the construction of the DPE determined by the French state, French society or French geopolitics, and what legal strategies of expansion did each case reveal?

In effect, the research revealed that the construction of the DPE as an abstract legal space obscures another history of juridical expansion, composed of institutions and ideas of jurisdictional accumulation, regionally and globally contested. This history breaks apart the Westphalian-DPE myth of territorial accumulation legitimising European ruling class hegemony. Moreover, it contests the homogeneous and transitory conceptualisation of France as the model of an emerging capitalist bourgeois state, central to the commodity form theory of law.

The method used was to focus on the four dimensions of social classes, legal institutions, legal and political thought, and geopolitical orders and dialectical dichotomies. From these it was possible to distinguish three different dynamics of jurisdictional accumulation.

First, European politics of treaty making consolidated dynastic rulers amongst themselves and as contenders to the threatening hegemonies of French revolutionaries and emerging British capitalists. Second, the struggles between political debates and various legal orders oscillated between innovations, resistance and collaboration between the monarchy, nobilities and legal actors, played out on various regional scenes. A third dynamic was observed in the French colonies, where the monarchy put in place specific and locally adapted systems of rule that contrasted with later 19th century developments, and created particular struggles and legal-political combinations. These can be associated with the expansion of absolutism overseas, where patterns of divided sovereignty and *Ancien Régime* institutions emphasised the non-developmental and locally specific character of mercantilism.

The hidden history of jurisdictional accumulation during the French era, i.e. the inter-dynastic private-public club (section two), the conflicts for French state formation (section three) and the mixed institutional experiments of colonial practices (section four), shows that 17th and 18th century forms of sovereignty constantly shifted in form *and* function. Thus, the origins and intrinsic logic, if at all possible, of extraterritoriality, cannot be linked back to a set homogeneous structure described as 'Westphalian sovereignty'.

Instead, we must now turn, in the final chapter, to British-driven 19th century forms of extraterritoriality. From these, it is argued IL became a more unified but also more restricted strategy of political and economic hegemony, rather than a mix of processes of jurisdictional accumulation and international treaties resulting in inter-dynastic competitive *entente*.

CHAPTER 5 - FROM ENGLISH ENCLOSURES TO BRITISH EXTRATERRITORIALITY

The previous chapters argued that early modern Spain and France respectively developed strategies of jurisdictional accumulation as local and global mechanisms of power assertion. This research enriches and contests existing histories of IL and extraterritoriality that refer back to a Spanish and French legacy. Specifically, the alternative step back defended in this thesis entails breaking apart a conventional progressive narrative of modern sovereignty to reveal instead the different sociological lineages across Europe of legal strategies of expansion.

The final frame of this historical sociology consists in reconnecting 19th century extraterritoriality with legal strategies developed in early modern England. This history spans from the formation of a more or less centralised feudal monarchy, to a system of agrarian capitalism, into, finally, the expansion of the British Empire. The chapter explores how 19th century extraterritoriality constitutes a new strategy of accumulation. This is based on England's nexus of state formation (common law, monarchy and landowner) and on capitalist strategies of land improvement, or primitive accumulation. It follows that extraterritoriality should be differentiated from jurisdictional accumulation. Crucially, extraterritoriality should be considered an essential factor in the institutional diffusion of the separation of political and economic spheres and of the ideal of the universal system of sovereign equal states. Finally, as will be discussed in the following and concluding chapter, the implications of this argument for contemporary theories of judicial globalisation consist in politically and historiographically accounting for the overlooked role of jurisdictional actors, as accumulation for and struggle against dominant power relations.

Before such conclusions, however, this chapter must defend the more controversial claim of the specific lineage and trajectory of 19th century extraterritoriality. Historians of IL associate this period (1815-1919) with Britain's 'golden age'. The hegemony of the British Empire influenced, if not dictated, the terms of international legal debates and the functioning of legal institutions (Grewe, 2000: 429-574; Sylvest, 2008; 2004). However, this narrative masks the fundamental event of the origin of capitalism in 16th to 17th century England and the determining role of the common law in that transition. In most historical studies, this omission takes as a given that the transition to capitalism is a separable and even inconsequential event in relation to the development of IL. In a few cases, the omission is justified by a different historical and geographical interpretation of the transition (Miéville, 2005; Cutler, 1999; Chimni, 2007). This chapter thus aims to contribute to both instances of omission.

In relation to the first case, it was previously discussed how, conventionally, old and new forms of extraterritoriality are both thought to be emerging from Westphalian sovereignty and thus sharing the same logic of managing legal differences between states (Raustiala, 2009). This chapter shows that this 'logic' is in fact a product of British universalism, as it clashed and evolved from the political and jurisdictional struggles with continental legal strategies of expansion (jurisdictional accumulation), discussed in the two previous chapters. Hence, Europe's different political systems and transitions to capitalism provide insights into the different 'logics' of legal strategies of expansion.

In relation to the second case, this chapter shows that the history of IL should be more engaged with the debate on the origins of capitalism. Firstly, let us recall that this debate discusses whether capitalism occurred broadly through the early modern (16th century onwards) expansion of European trade, or whether it occurred during England's early agricultural revolution. Answering this question has become more imperative as a growing number of legal historians are closely associating the construction of modern IL with European expansion. More precisely, instead of assuming legal imperialism as a given or as an accidental appendix to European supremacy, as is the case in classical histories, critical scholars problematise European domination as an analytical starting point. Accordingly, European expansion and the imposition of political, economic and legal relations have become key to understand contemporary IL and international relations.

For example, some claim the dichotomies between colonisers and colonised, specific to the 19th century, have remained at the heart of the theory and practice of IL today. Thus, in order to contribute to contemporary problems raised by critical studies of IL, notably the 'liberal dilemma' and the problem of legal agency, a more thorough investigation of the capitalist origins of extraterritoriality is first necessary. Considering the lack of debate on the relation between capitalist modes of production and international legal orders, in spite of recent work on colonialism and imperialism, such a focus is pressing.

Specifically, a PM approach to the history of IL is based on a definition of capitalism that distances itself from economistic Marxism and orthodox liberalism. Agrarian capitalism is defined as a mode of agricultural production in which producers become divorced from their means of production, and are led to sell their labour power as workers to a capitalist landowner. This social relation between worker and capitalist is based on a specific configuration of property relations and social classes. This creates a 'disposition of power', which "has as its condition the political configuration of society as a whole – the balance of class forces and the powers of the state which permit the expropriation of the direct producer, the maintenance of absolute private property for the capitalist, and his control over production and appropriation" (Wood, 2002: 20). Linked to a revised chronological and geographical narrative of early modernity (Teschke, 2003), this approach leads to a two-

pronged developmental trajectory between France and England's transitions out of feudalism. Thus, this chapter explores the implications of this narrative for the specific changes in extraterritorial regimes during the 19th century, and whether the differences between France and England's legal strategies, but also between their legal cultures, can be explained by their different regimes of social property relations.

The first section presents the main points of IL historiography on the role of Britain in the 19th century. Focusing on the standard of civilisation and the formation of various categories of sovereignty, the section questions the paradox of universality. It then contrasts this paradox with structural explanations for its emergence, i.e. Marxist theories of imperialism and IL. Concluding on the more adequate potential of a non-structuralist PM analysis, the chapter henceforth investigates how the development of a 'universal' and 'civilised' international legal system, in the late 19th century, is informed by the 18th century diffusion of English capitalist social property relations.

To do so, section two starts by exploring the role of legal institutions and legal-political thought during the formation of the English state. This analysis reveals the importance of the common law in determining England's specific trajectory preceding Britain's rise in the history of IL. The importance of this role consisted in providing an institutional and theoretical canvass that defined social struggles over the definition of the nexus between the right of private property, the liberal individual (landowner) and the English state. Crucially, this nexus was the product of a new strategy of expansion driven by land improvement, i.e. primitive accumulation, which transformed existing property relations into capitalist social relations.

The following two sections show how this early modern legacy was preserved so as to produce a specific trajectory of British juridical expansion and IL. The third section concentrates on changes in international legal thought and political debates, notably the struggles between classical (or scientific) and pragmatic legal traditions, and between different conceptions of legal positivism and naturalism. The fourth section investigates 19th century international legal events, specifically the development of territorial sovereignty through practices and legislation of extraterritoriality and the 1884-85 Berlin Conference.

Both sections testify to the specific pragmatism of British actors driven by their model of legal-political institutions and ideas, but also to their reaction to continental processes of jurisdictional accumulation. This reaction was characterised by the acceptance of dividing sovereignty according to the emerging concept of civilisation, in spite of obstacles inherent in legal theory. Extraterritoriality became a very useful tool to divide sovereignty while maintaining an ideological and institutional upper hand over 'semi-sovereign' countries, 'helping' them towards their transition to a capitalist regime of property relations and a system of sovereign states.

The Origins of 19th Century IL

In a first instance, the following section presents the conventional narrative of Britain's role in the 19th century development of IL, specifically focusing on legal strategies of expansion. The emergence of different forms of sovereignty and their relation to European concepts of civilisation is conditioned by the overarching influence of British imperialism. Historiographical debates hinge either on the contingency or structural continuity of this imperialism. Hence, the section will in a second instance hone in on the problem of defining imperialism as the cause of shifts in legal orders. It concludes that to contribute to these debates, the chapter needs to explore the sociological lineages through which 19th century extraterritoriality was shaped.

Civilisation, Sovereignty and the Paradox of Universality

The British Age of IL coincides with the development of a legal universal standard based on the concept of civilisation¹²¹ and sovereign independence. From the late 19th century and the birth of modern 'International Law', international legal mechanisms became more technical, professional and unavoidable for the conduct of foreign policy, both in times of war *and* (for the first time) in times of peace. This specialisation, framed by the expansion and standardisation of the European states-system, resulted in a more explicit jurisprudential and institutional delimiting, by the early 20th century, of the disciplines and practices of IR and IL.

In contrast, critical interpretations of the 19th century, from Constructivist, Post-colonial, Critical and Marxist approaches, focus on the legalisation of the European vs. non-European distinction, the conceptual and practical implications of the state system as a contested pluriverse of sovereign forms, and how these events challenge the history of IL as a chronological progression of international legal orders.

However, the importance of the distinctions between barbarous and civilised peoples for the construction of 19th century IL is not under dispute by historians (Grewe, 2000: 454). These distinctions were manifest through a mixture of traditional means of foreign policy (e.g. treaties between sovereigns from the model of 17th century DPE¹²²) and novel means defined as 'international law' (conferences, acts and conventions, new forms of territorial sovereignty). These new forms required the use of a new legal vocabulary. Next to the more

¹²¹ The concept of civilisation remains understudied in IR and IL, but see Keene (2005: 160-193) for a recent account in international political thought. Another crucial and groundbreaking exception to the overall lack is Gong (1984).

¹²² The DPE, or European public law, refers to the previous period of international relations grossly from 1648 to 1815, where international legal processes were dominated by French hegemony. This period is discussed in the previous chapter.

confusing use of notions of semi-sovereignty, quasi-sovereignty or even suzerainty (Benton, 2010), lawyers and politicians, mostly British, developed a hierarchy of sovereign entities from chartered company authorities, protectorates, dominions, colonies, to sovereign states. Other distinctions were used such as 'spheres of interest' and 'spheres of influence', the former representing ownerless spaces contiguous to colonies (thus benefiting from potential legal amalgamation), and the latter referring to state-like territories but weak and thus open to influence (e.g. Morocco, Persia or China) (Grewe, 2000: 474; Benton, 2010: 222-276). A crucial condition of these distinctions was their relative equation to the concept of civilisation, for which a graded scale was institutionalised by jurisprudence, acts and conventions. In effect, the use of 'semi-civilised' entity (e.g. Japan or China) was equivalent to a semi-sovereign state.

Thus, the concept of state sovereignty and its derivatives implied a legal formalisation of political entities as an important move away from early modern 'personalised' international relations. However, the equation between sovereignty and civilisation as mutually constitutive created a hidden set of social, cultural and institutional criteria to which aspiring states had to comply. Hence, legal categorisation, and by extension legal equality, was conditioned by racial, political or economic standards defined by Western civilisation. This was recognised by 19th century publicists: " 'it will never be possible for civilization to extend uniformly over all parts of the world' and hence a legal community 'will never be brought to realization equally and uniformly with all states'." (Gong, 1984: 63; quoting Pascal Fiore, an Italian 19th century international lawyer).

Consequently, the question that is controversial and especially relevant for Liberal and Neoliberal approaches is whether these criteria and standards dissolved after the colonial administering of non-European territories. In other words, does the force of legal standardisation trump the interests and assumptions that drove the expansion of IL? Liberal internationalism was founded on the assumption that the willingness of European states to cooperate in the process of expansion gradually led to a global order of standardised and thus equal states. In other words, if legal equality was at first subordinated to European civilisation and hegemony, its force as a legal structure overcame racial, political and economic inequalities. Additionally, legal standardisation remains a goal worth defending since it is separable from the pathological material inequality of imperialism. Thus, the contradiction between a universal goal of legal equality and the imposition of a particular civilisation is supposed to be resolved by the long-term benefits (economic and political) of liberal expansion. The force of contemporary IL, as a standard of legitimacy defended by Liberal scholars and lawyers, is that it is able to rise up clean out of the tainted ideology and practices of 19th century imperialism.

To understand this claim, we need to ask what was specific about 19th century imperialism. A first important point is that legal relations between Europeans and non-European societies during the *Ancien Régime* were not solely based on their conquest and subordination, as they became after the 18th century. “Up to the late eighteenth century there was no serious European endeavor to develop jurisdiction over an indigenous population according to their own law. Nor were there attempts on a large scale to extend European law to the subject population. There was no real system at all.” (Fisch, 1992: 23) This point was confirmed in the previous chapter, but also refined through the discussion of divided notions of sovereignty and mixed cases of jurisdictional accumulation. Once the European nation-state matured, however, legal relations between Europeans and non-Europeans mostly consisted of European domination (especially in Africa and North America). The 19th century saw the hardening and more definitive engagement of all European states overseas, using IL as a legitimate authority, scientifically and politically, through public opinion and liberal ideas of progress (Keene, 2002; Morin, 2010; Benton, 2010).

What was the catalyst for this ‘hardening’ or definitive legal ascendancy of the Western European state over contending political entities? If a liberal and idealistic view of the expansion of sovereign rights constituted a powerful discourse for contemporaneous international lawyers, informed by German and French theories of naturalism, rationalism and positivism (Koskenniemi, 2001; Simpson, 2004: 10), British imperialism remains the central cause for the shift in international legal order: “Britain wanted to prevent the division of the world into a European, monarchical part and an American, republican part.” (Grewe, 2000: 461). Accordingly, the British Age appears as the consecration of a policy of ‘universal balance of power’ over two contending types of ‘continental balance of power’: the U.S.A.’s Monroe Doctrine (1823) in the Americas and the Holy Alliance in Europe (1815). Most analyses (Realist, English School and Critical) concur on the determining role of British imperialism, despite contradictory positions on whether IL was able to thereafter transcend its 19th century heritage¹²³. Either way, the 19th century saw the transformation of the international legal order into a self-referential system driven by British geopolitical and technical ascendancy, infused by the European/non-European and civilised/barbarous distinctions. This order manifested itself through a panoply of legal concepts for expansion.

A paradox remains: why and how did 19th century European states, and *a fortiori* Britain, acquiesce to develop a ‘self-referential system’ of IL? In other words, why did Britain

¹²³ An exception comes from the historical constructivist camp, where Osiander for example argues that notwithstanding the major internal changes of countries such as France and Prussia in the revolutionary and Napoleonic period, these remain as post-1815 international actors very similar to their pre-1789 ‘incarnations’. Thus in his view, the 19th century order is an ‘adaptation’ of the 18th century order (2007: 26). He cites the continuity of diplomatic practices as one example. Reus-Smit (1999) is another notable exception from a constructivist perspective.

need to develop a paradoxical order based on civilisational superiority *but* layered with an ideological potential of universality to transgress that superiority? At first sight, this problem refers back to the 'liberal dilemma' identified previously¹²⁴, which questions the structural inequalities embedded in liberal discourse. Accordingly, it is tempting to attribute the superficial abstraction of the international legal order to the emergence of liberal IL in the late 19th century, as Koskenniemi argues (2001). However, this argument is chronologically and sociologically unsatisfying, since it does not provide an explanation for shifts in the early 19th century. Moreover, it is somewhat counterposed to analyses of British imperialism and British IL being at odds with the practices and traditions of continental lawyers. In other words, and following from discussions in the previous chapters, there is a difference between continental liberal ideas of the role of the state, associated with French and German theories of sovereignty, and Britain's role in 'liberalising' the international legal order. If Britain facilitated optimal conditions for a global and open playing out of what some term the 'hierarchy-equality dialectic' (Simpson, 2004), this could be read as a relinquishing of state hegemony and thus a limit on the power of any state to keep IL as its privileged playing field. This was not the intention of the European monarchies emerging from the period of the DPE.

But was it Britain's? Specifically, can Britain's history of social property relations help answer this question and uncover its influence on IL? To do so, it must avoid assimilating its role to one of liberal universalism, which would amount to a circular argument similar to contemporary accounts of globalisation, where the object of explanation becomes its source. In other words, the temptation to think that the abstract universality of the international legal sphere should interrupt the relevancy of delving into Britain's internal specificities must be resisted.

In response, some scholars focus on more conjunctural or context-specific causal explanations for the specificity of British-led IL (e.g. Benton, 2010). Accordingly, the 'form' or abstraction of law over and above relations of domination or coercion can be read as a contingent consequence of the encounter between different peoples and their legal systems. This implies an understanding of law as different sets of social relations, specific to geography and cultures but interacting as contested sites of order and power. If empirically rich, this work shies away from any structural analysis and therefore ignores important transitions and concepts of order that are recurrent in contemporary theories. If this thesis argues that concepts of transition and order throughout early modern historiography have been problematic and error inducing, this critique does not claim it can do away with structural reifications. Instead, it questions and reinterprets them according to alternative historical materialist categories.

¹²⁴ See chapter two.

Therefore, this chapter explores the following hypothesis: that the emergence of agrarian capitalism in England largely explains the particular British ascendancy through indirect and informal control, and thus the specificity of 19th century extraterritoriality. The following will recall the Marxist debates such a hypothesis has to contend with. It will conclude that a social property relations approach to the 19th century British age of IL remains justified, although the concept of imperialism needs to be reviewed according to the determining role of legal strategies of expansion.

Debating Imperialism and Capitalism

The above review highlights the problem of assessing Britain's paradoxical role in increasing the variety of sovereign legal forms while attempting to constitute an independent universal legal order. This paradox is also the starting point of Miéville's description of the relation between international law and imperialism, as mutually constitutive and based on the commodity form theory of law (2005: 225-293). His work places the expansion of capitalism at the centre of our present problematique: how does theorising this expansion affect the interpretation of Britain in the 19th century 'universalising' narrative?

For Miéville, both processes, capitalism and international law, are intertwined as imperialism. Imperialism is the material manifestation of two processes, expanding exchange relations and expanding juridical (or sovereign) relations. Hence, the transition to capitalism is determined by the imbrications of these two processes through early modern mercantilism. If his analysis places the juridical aspects of international relations at the forefront of Marxist theory, it also isolates by theoretical abstraction the juridical as the expression or form of capitalist *exchange* relations. In other words, it negates the theoretical links between juridical abstraction and capitalist relations of *production*. This leads to neglecting the causal role of different contexts of social relations in constructing and deconstructing legal strategies of expansion. In effect, this is problematic for understanding Britain's abstraction of the universal. If the previous chapters showed this method to be costly in the face of different legal strategies of expansion developed by Spain and France, there is no reason to assume this should not also apply to England.

If so, can PM provide a sounder basis to explain Britain's paradoxical pluralisation of sovereign forms on one hand, and the universalisation of the international legal order on the other? Specifically, how does PM explain British imperialism, and is this narrative compatible with the present research on juridical expansion?

Wood (2003) argues that British capitalist imperialism differed significantly from contending early modern imperialisms because of the notion of land improvement relative to agricultural productivity (she cites the invasion of Ireland (1649) as the first act of English

imperialism). In addition, Comninel (2000) and Parker (1996: 207-261) show the importance of the common law for these developments. As an essential institution for establishing the ruling class and monarchy, it secured a regime of property relations that led to agrarian capitalism¹²⁵ and tenure¹²⁶. England's state formation and development of capitalist social relations relied on the particularities of its common law system.

Concurrently, early modern Europe was characterised by the overlapping variety of legal codes and legal orders: e.g. *ius communis*, feudal law, canon law, merchant law, *ius naturalis*, etc. (Berman, 1983). Treaties and customs of IL existed in just war theories or diplomatic privileges. The personalised, territorially unfixed forms of sovereignty, along with the lack of centralised government, confirmed the fluidity and interdependence of continental legal doctrine and practices. Moreover, 19th century civil law codes based on Napoléon's 1804 *Code Civil*, remained substantially different from the English common law model, in spite of other shared characteristics (Ibbetson, 2001; Van Caenegem, 2002).

We must then assume, regardless of the transition debate, that 19th century capitalism in Europe, and crucially, imperial strategies of expansion, developed on the basis of different legal systems. This is an important 'complication' in the process of capitalist expansion, and further justifies the need to clarify the relationship between legal orders and strategies of accumulation. Such clarification is necessary to understand how the differences between English agrarian capitalism and continental forms of exploitation gave way to a universal and equal conception of IL as the façade of the separation of the political and economic spheres.

To this end, 19th century juridical expansion must be analysed through English state formation and British capitalist expansion. Did these strategies differ from previous strategies of jurisdictional accumulation, and why? We will first look at England's legal sociological composition and development of political theory (section two), followed by Britain's role in international political-legal debates (section three), and finally, their effects on international legal practices (section four).

English State Formation, Common Law and Political Theory

¹²⁵ "The English ruling class was distinctive in its growing dependence on the productivity of tenants, rather than on exerting coercive power to squeeze more surplus out of them [such as in France]. In other words, English property relations had what Brenner calls their own distinctive 'rules for reproduction'. Both direct producers and landlords came to depend on the market in historically unprecedented ways just to secure the conditions of their own self-reproduction. These rules produced their own distinctive laws of motion. The result was to set in train a new historical dynamic: an unprecedented rupture with old Malthusian cycles, a process of self-sustaining development, new competitive pressures that had their own effects on the need to increase productivity, reconfiguring and further concentrating landholding, and so on. This new dynamic is agrarian capitalism, and it was specific to England." (Wood, 2002: 53).

¹²⁶ Tenure refers to peasants under customary law and feudal obligations, and can be contrasted to the freehold system that applied to peasants on the royal demesne, i.e. under the jurisdiction of the common law. However, as the previous quote shows, the way in which tenants became necessary and assimilated to the ruling class is distinctive and led to the gradual dissipation of the coercive relation between lords and tenants.

The Legal Order and Legal Profession

The history of England's state formation must begin with the Norman Conquest of Anglo-Saxon England in 1066 and the imposition of Norman feudal rule. Teschke (2003: 95-112) shows that, from the mid-11th century, a 'transnational knightly class' from all regions of Europe and with varied interests and means, expanded north, east, southwest and southeast. The conquest of England (Teschke, 2003: 104-107) resulted in the "restriction of autonomous noble rule and the generalisation of royal rule" (Gerstenberger, 2007: 63).

"A tenurial revolution steamrollered the country, bringing radical changes to the ownership, size, and constitutional status of lordships. Lords came to hold their estates 'of the king' – hereditarily, but not as private patrimonies. The king remained the supreme landowner of the entire territory." (Teschke, 2003: 105)

From the 12th and 13th centuries, monarchs were powerful and unavoidable partners of the nobility, rather than contending actors in a fragmented and multifarious patchwork of jurisdictions, codes and estates, such as in France. This clearer institutional framework produced, through the work of lawyers, a division "between those peasants who had access to the legal recourse of the common law [i.e. the royal courts], and those others who were subject to the rule of their lords without any legal protection" (Gerstenberger, 2007: 65). The 'royal-common law' peasants were identified as 'freemen' or *liberi* (freeholders), while those under feudal law were qualified as 'unfree' men or *nativi* (serfs). The common law originated simultaneously with the nobility's prerogative of 'fixing the legal status of the villein's unfreedom' (*ibid*: 66). Both systems emerged from the change in forms of cultivation and the need to formalise 'agricultural relations of production'. "The common law was, in its origins, an amalgam of existing custom and of Norman imports (chiefly the land law), an essential part of which was the local inquest which became the jury." (Wood & Wood, 1997: 7) It then became a shared resource or pool of power for the king and the aristocracy through the institution of the Parliament. If the characteristic of the common law was its duty to custom and precedent, as enunciated by the royal courts, Parliament also developed ways of 'perfecting' it with new legislation; thus both Parliament and Crown would struggle to use the common law to their advantage (*ibid*).

The ongoing process of state formation consolidated these developments. "By 1600, England had become a unified state, with a clear centre of power, a national or 'common' law, a national representative body, and even a national Church subordinate to, and sustaining, the unified state. This unique political unity was expressed in the famous formula, the 'Crown in Parliament'." (Wood & Wood, 1997: 5) The 17th century was characterised by

civil war, popular uprisings, the execution of Charles I and the consequent institution of the Commonwealth of England with Cromwell as 'Lord Protector' (1649-1658). These decades were then followed by what is termed the Glorious Revolution of 1688. But none of these events eradicated the unity of the state. "The so-called Glorious Revolution ended Stuart rule, bringing William and Mary of Orange to the throne, and with them, as historical convention informs us, the kind of constitutional monarchy and parliamentary supremacy that remains in place today." (Wood & Wood, 1997: 112).

It follows that if the common law was a central component to the English unified state and to royal power from the 12th and 13th centuries onwards, lawyers also played a crucial part in early modern English society. For example, they occupied a much larger variety of roles than they do today. Before the Reformation, Burrage recalls, quoting Ives (1983):

"law was practiced in a commercial spirit, in the '*laissez-faire, laissez-aller* atmosphere of a market economy'. Lawyers were ubiquitous, seeking commercial opportunities wherever they arose, and were therefore to be found in an 'enormous range of activities, agents for landowners, foundations of hospitals, wine ordering, land transactions, bankers, possibly also money lenders.' (...) In sum, the entrepreneurial, business-oriented, versatile kind of lawyers that as we have seen emerged in the United States in the nineteenth century, were flourishing in the sixteenth and seventeenth century England." (Burrage, 2006: 391)

After the 16th century, the demand for legal representation notably increased¹²⁷, with a confusing variety of qualifications and actual corporate bodies (though the role of corporations in England never equalled in kind that of France). Some of these orders continue to exist. 'Serjeants' went on to become judges, and could be considered at the top of the legal hierarchy, even though a strict hierarchical pyramid did not exist as such. In second came the 'apprentices-at-law' and 'utter-barristers' of the Inns of Court, who later became the modern bar. A third group consisted of the advocates as such, doctorates in civil law and thus specialised for ecclesiastical and admiralty courts. Finally, the largest group was the most varied and less regulated, consisting of attorneys, proctors, solicitors, clerks, and non-qualified practitioners who performed various legal tasks, especially in the provinces (Burrage, 2006: 388-390). The Inns of Court were particularly interesting institutions which distinguished the English legal system. These residences and training grounds for aspiring

¹²⁷ "The litigiousness of the English was already well established in the Middle Ages, became a notable element of aristocratic and gentry life in the sixteenth century as lawsuits became more fashionable than personal violence, and was also apparently current among the lower orders. Practically every court, whether civil or criminal, experienced an increase in business between the mid-sixteenth and mid-seventeenth centuries, and the degree of individual participation in legal proceedings could be remarkable." The increase was such that this litigiousness was seen as a sin and "launching suits on slight or malicious grounds, with an intention to further a feud, was a national problem" (Sharpe, 2003: 168-169)

lawyers, all based in London, also served as educational passages for the gentry and nobility.

Before the revolution of the 1640s, there was “no clear and settled principle governing the relationship between the crown and the Inns.” (Burrage, 2006: 402) The king, the Privy Council, the judges and the Parliament all had a legitimate interest in the Inns, but power over them was never defined and they had little respect for their authority especially when these various actors tried to meddle in their affairs (*ibid*). In 1641, on the eve of revolutionary events, the King and Parliament lobbied for the support of the Inns. The latter responded by declaring their support for both authorities. This act symbolised the balance of the parliamentary monarchy and the levelling role played by the common law and its institutions. In contrast, until the late 18th century Revolution and Napoléon’s drastic recasting of the legal system, French lawyers and courts were constantly in the midst of political struggles, intrigues and local-feudal representations. A final specificity of the English case lies in the fact that its revolutionary age (1640s and 1680s) did not, unlike France and the U.S., reform the judiciary:

“the fact that the parliamentarians appealed to precedent and to the common law whenever they could, and evidently felt themselves to be best justified and more secure when they did so, is of fundamental importance in understanding their behaviour. And it is this that distinguishes them from other revolutionary leaders.” (Burrage, 2006: 430)

In sum, a combination of the centralising evolution of the English state, the independence of its main organising body (Inns of Court), and the structure of legal argument (precedent) enabled a particular arrangement between judges and legal practitioners. All this gave the common law a fundamental albeit background role in English politics. However, if the 16th century saw the emergence of lawyers and legal institutions as balanced institutions, this appearance of neutrality should not be abstracted from the social relations and debates surrounding their active role in the English state.

Primitive Accumulation: Enclosures

“Whereas in France magisterial resistance to the claims of royal authority was impeded by the separation of French law into its private and public components, in England the defence of the public authority of Parliament fused with a defence of the rights – particularly the property rights – of the individual.” (Parker, 1996: 247-248)

As this quote introduces, English law was defined as ‘upholding the rights and properties of subjects’, a defence of their liberty which came with the price of expensive and delayed judicial proceedings (Holmes, 1997: 288). This in effect meant the protection of the property of the ruling classes: “Law, defining and defending property, was central to the ideology that legitimized their authority.” (*ibid.*: 289) However, if Parker notes the fusion between Parliament, property rights and the individual, this particular relation was not left unquestioned and took a certain evolution in the arguments of political thinkers before being coherently articulated and exported. Resistance hardened especially against the system of enclosure (Thompson, 1975; Wood & Wood, 1997: 15-16; Holmes, 1997), one of the new techniques used by landowners in England’s early agricultural revolution. This consisted in “the enclosure of open fields which had been cultivated under regulation by the village community, as well as the enclosure of wasteland and the common land upon which many smallholders and others depended for grazing, wood and other necessities.” (Wood & Wood, 1997: 15). Provoking riots and acts of disobedience famous to this day, landowners sought to tie the right of property to their individual right, through the courts and particularly, through legislation such as the Black Act (1723), which introduced ‘fifty new capital offences’ without ‘serious division’ in Parliamentary debates (Thompson, 1975: 21). This struggle, alongside many other instances of social unrest during the period of revolutions, provided political thinkers with an unusually fertile ground for debates and ideas. Indeed, enclosures and the struggles surrounding their defence by the state are attributed a particular place in the history of early modern England:

“ ‘Enclosure’ did not just, or even necessarily, mean closing in or fencing off a piece of land. The real essence of enclosure was the extinction of customary rights – the traditional rights that permitted people to make use in various ways of land held in common or even ‘privately’ – for example, the right to gather wood or to collect the remnants of harvests. *Enclosure also meant that the community was excluded from the regulation of production.*” (Thompson, 1975: 21 added emphasis)

The role of lawyers, judges and Parliament in these events is crucial, and a detailed account of such practices is beyond the scope of this chapter. Still, there is no doubt that these institutions stood for the rights of landowners, interpreted as rightful individuals who acquired such rights because of their propensity to develop agriculture and improve the land. Holding property also gave individuals the right to vote, thereby clinching the circle between the state, property and the landowning individual¹²⁸.

¹²⁸ We have here the basic analytical triptych that was used in the introductory chapter, following conventional historiography, to schematise the major concepts of the evolution of IL, i.e. *orders* (state), *actors* (landowning individual) and *strategies* (property). As is shown here, this analytical division is sociologically loaded, in the

However, Thompson (1975: 245-269) is at pains to show the numerous examples where the law and conceptions of rights defended by commoners, rioters or political thinkers were used, even at times successfully, to uphold their right to the land or to resistance itself. If Thompson is reluctant to theorise his historical findings, there is nevertheless an emerging argument that law (institutions and profession) operates as a form inevitably fluctuating according to contested social relations. In any case, during the early days of agrarian capitalism, this form was certainly not tied to private property.

Wood & Wood (1997) stress the fact that 17th century political ideas of liberty and natural rights were not associated with the defence of property. They argue that Locke was the first to make the reverse and fundamental link, essential to the expansion of capitalism as defined by the condition of land improvement. Before Locke, the Levellers and the Diggers, radical groups protesting against the enclosure laws, defended liberty and natural rights (as in local and customary rights) against property and property owners. Hence, there still existed an open distinction between rights, property rights and liberty, until Locke influentially argued that the right of property was a condition of individual freedom.

“A major part of Locke’s theoretical strategy is to adapt such radical ideas for the sole purpose of making the strongest case for Parliament against the king, and for the right of revolution, while at the same time depriving those ideas of their most democratic implications. (...) He seems to be saying that a doctrine of natural right, based on the Leveller concept of ‘self-propriety’, can be construed in such a way that it argues for a right of revolution against an absolute monarch but without any ‘levelling’ consequences, any danger to property, or any threat of popular democracy.” (Wood & Wood, 1997: 119).

Sovereignty and Social Practices

As the previous chapter introduces the role of Hobbes, Grotius and Bodin in the history of IL, I will focus here on how they relate to intellectual debates particular to English social relations, with the crucial addition of John Locke (1632–1704). These are essential so as to further understand how English strategies of juridical expansion, in this case primitive accumulation, were differently articulated to contending doctrines and strategies of jurisdictional accumulation developed by Spain and France. Specifically, debates in England over land improvement reflected the particular regimes of social property relations and

sense that it evolved as a product of one particular instance of state formation and regime of social property relations in early capitalist England. This further justifies the use of the four angles laid out in chapter two (geopolitical orders and dialectical dichotomies, legal institutions, social classes, and legal and political thought), as a more adequate framework to account for the development of IL across different states and regimes of social property relations, but also, crucially to incorporate the ideological and intellectual dimension to structural Marxist analyses of IL.

justified new conceptions of property. In effect, these led to novel legal institutions and mechanisms but *also* to changes in relations of production, at home and overseas.

As an illustration of the importance of these regimes for understanding political concepts, an interesting explanation can be found to the differences between Bodin and Austin's conceptions of 'law as will of the sovereign'. Wood & Wood argue that Hobbes transposes this conception to the English context, which can be argued to be taken on later by Austin:

"[I]n the English context, [Bodin's conception] can be used against the common law tradition and against Parliament's claim to be the paramount interpreter of the common law. But if the French doctrine of sovereignty is capable of serving many of Hobbes's purposes, there is one major thing it cannot do: it cannot cope with a multitude of free individuals who claim the right of resistance and even more active and continuous political rights." (Wood & Wood, 1997: 107)

Accordingly, the emphasis on 'free' and individual political rights in England put a particular pressure on political thought and theory. This pressure was first penned down by Thomas Smith (1513-1577), John Ponet (1516?-1556) and even Richard Hooker (1554?-1600), though the latter was more of a corporate thinker. These political thinkers preceded the Revolution and the Putney Debates of 1647¹²⁹. Their particularity was in conceiving of the state as constituted of individuals, or of the commonwealth as 'a multitude of free men collected together' (Wood & Wood, 1997: 42). This led to doctrines justifying individual resistance to tyranny, and the later formulations of individual rights found in the 17th century (*ibid*). Similarly to Locke, Hobbes had to react to and incorporate these previous ideas, and in this case, he had to deal with the concept of 'a multitude of free men'. Wood & Wood show that the way in which he does this is over the issue of 'authorization'. Thus, "if the authors authorized a sovereign power to preserve their lives and their security, the sovereign may have unlimited rights to decide how to do this; but the one thing the authors cannot have authorized him to do is to fail at this task." (1997: 109). Hobbes thus defends absolutism but on radical premises, and thereby deprives the multitude of its political function.

"Nonetheless, for independent small producers still contesting the meaning of property, and at a time when the state and the law were major actors in the contest, the franchise and other political reforms demanded by the Levellers could have made a substantial difference. These were still the early days of capitalism, when the basic issues of property were still being disputed; when the mass of the population was not yet a dispossessed proletariat, subject because of their propertylessness to the purely economic power of capital; and when large proprietors still

¹²⁹ The 1647 Putney Debates were a congregation and discussion between the Levellers and Diggers on one side, and Ireton and Cromwell representing Parliament and the landowning classes on the other.

depended a great deal on direct control of the state to support the process of accumulating land, extinguishing customary rights and redefining the right of property itself.” (Wood & Wood, 1997: 136)

This provides us with a more complex and intricate picture of the struggle for rights and property in this early capitalist era. It also shows how important the early processes of primitive accumulation, alongside the problem of the common law as theoretical arbiter between contending social factions, were for these founding theories of sovereignty.

How did this translate internationally? The fact that early modern English legal-political thought was not as concerned with international matters to the extent that Spain and France were (e.g. doctrines of the law of nations, just war theories, discussions on status of foreigners) can be explained by England’s minimised need to defend state unity in the face of inside and outside threats. In other words, England did not need to think of strategies of jurisdictional accumulation, i.e. strategies that placed political authority above economic or commercial prosperity. Famous exceptions to this trend such as Hobbes and Locke might seem contradictory, but the argument can be maintained by looking at the larger and more conventional body of thought of practitioners and scholars (Sylvest, 2004; Kelly, 1992; Wood & Wood, 1997). Moreover, we can reiterate the point here that these exceptions have been problematically appropriated as the classical IR and IL canon of thought, to the detriment of contemporaneous debates and struggles (e.g. Skinner 1978; Tuck, 1999; Jahn, 2000; Wood, 2008).

For example, the importance of social context to understand political thought is found in various analyses of Bodin, whose pleas for an absolute and divinely ordained sovereignty were meant as a solution to France’s heterogeneous and overlapping political landscape. The fact that France was not unified and thus more heavily engaged in continental warfare and ‘state-led economic’ enterprises, meant that French diplomacy and debates over international matters had a more acute and pressing *raison d’être*. The 17th and 18th centuries were indeed influenced by French diplomacy and political ascendancy. But this does not preclude theoretically (and in fact, as I argue, results in mistakenly ignoring) the specific trajectory of Britain’s ascendance, and particularly the determining role of English property relations and political theory on the development of strategies of legal expansion such as enclosures, and later on, extraterritoriality.

International Legal Thought (18th and 19th centuries)

As shown previously, the relation between the common law, state formation and primitive accumulation produced a specific nexus between the individual, private property

and state. This initiated the 'isolation' of Britain from European dynastic geopolitics. This section shows how this was confirmed by the characteristics of British international lawyers and legal doctrine. This isolation through international legal thought is the first argument for maintaining the sociological lineage between enclosures and extraterritoriality as types of primitive and capitalist accumulation. The second argument, explored in the fourth and final section, focuses on late 19th century international legal practices.

Foundations and Struggles in Legal Doctrine

Following on from previous debates, Sugarman identifies a 'Hobbes-Locke-Blackstone'¹³⁰ link between the judiciary, state and individual freedom:

"Arguably the English state became increasingly dependent upon an autonomous legal profession and legal system in order to legitimize itself. In this way, the legal profession and legal system constituted the state. (...) Codification and the reform of the legal profession (notably the bar) and of legal education all suffered as a result." (Sugarman, 1986: 48-49)

In effect, debates on legal theory and legal education in the 19th century are indicative of Britain's ability to transcend established dichotomies. They thereby anticipate the effacing of the contradiction in IL between universality and European hegemony.

The classical period (c.1850-1907) of British legal doctrine tried to redress the poverty of legal theory. This poverty was due to the non-scientific character of legal education, traditionally based on practice (Sugarman, 1986: 40-43). In response, the classical period 'fundamentally reconceptualized the form and content of English law' (Sugarman, 1986: 54). However, if Bentham and Austin's work contributed, through the wider influence of utilitarianism and analytic legal theory, to studying law as a science, German historical jurisprudence remained a strong alternative to the rise of legal positivism. The common law (its judiciary and jurisprudence) therefore hovered above theory instead of embracing it:

¹³⁰ Sir William Blackstone (1723-1780) was a British jurist, judge and Tory politician most noted for writing the *Commentaries on the Laws of England*. His influence on legal theory is considerable: "Despite the confusions of the *Commentaries*, despite the self-satisfied tone and the special pleading, Blackstone is an effective exponent, and a representative, of the *modus vivendi* which typified the relationship of the law and the state in the 18th century. Theoretical inconsistencies, even occasional squabbles, were mediated by the recognition of the ruling class that the law guaranteed their own property rights, and that it had displaced the religious sanctions of an earlier period to legitimize their authority." (Holmes, 1997: 288-289).

“Thus scientific rationality was forever being mediated, refracted and sustained by an omnipresent irrationality: therein lies the peculiar rationality of the common law mind.” (Sugarman, 1986: 40)

Another important dichotomy was that between natural law and positivism. If natural law influenced concepts of British universality, its meaning was varied and distinct from continental versions. “The concept of ‘natural law’ or ‘law of nature’ was from the end of the 18th till the beginning of the 20th century subject to a variety of meanings and much confusion.” (Sylvest, 2004: 24-25). Sylvest concludes on the presence of two central meanings, which remained intertwined during the 19th century. Other authors argue for the shift from one meaning to the other, i.e. from the more traditional sense of ‘natural law’ (‘moral, ethical, and rational standard’) to that of the ‘law of nature’ or ‘Enlightenment naturalism’ (‘empirical or descriptive standard’ based on the state of nature before entering a social contract) (*ibid*). Kelly (1992: 271-277), for example, emphasises the influence of this second sense, and shows how from Hume, to Vico and Montesquieu, and then Burke and Bentham, late 18th century thought was redefining the concept of nature to accommodate changes in historical and environmental contexts (i.e. nature in the sense of ‘experience’). In any case, the natural law tradition in English jurisprudence is to be contrasted to Enlightenment ideals of natural rights based on reason and present in the French and American constitutions. This distinction contributed to the difference between continental and Anglo-American scholars.

Moreover, the struggle between classical jurists and the practice-oriented majority of lawyers helps to situate international lawyers. For theoretical and practical reasons, international lawyers tended to emerge from the tradition of classical legal theorists. “The classical period appears more cosmopolitan, more sensitive to foreign learning, theory and history and more overtly concerned with the relationship between law and society relative to what followed.” (Sugarman, 1986: 53) Thus, in continuation of the previous section, where the institutions of the common law and their strong ties to the state marked Britain’s ascendancy, these arguments show that its specific trajectory continued through the hegemony of practitioners and the doctrinal debates they faced between classical and pragmatic legal theories. The following will develop how these manifested themselves in IL.

From Common Law to Universal IL

To summarize the logic of 19th century international political thought, Keene focuses on the concept of European civilisation, which coupled to the growth of commerce was meant to lead to personal happiness and international peace. This picture rests on the condition of a *laissez-faire* government with the individual citizen as the limit to authoritarian

regimes (Keene, 2005: 170-171). In spite of critiques from conservatives and a handful of critical thinkers, this liberal view remained dominant. In parallel, legal positivism grew stronger, and its amalgamation with liberal internationalism is characteristic of the period.

For example, when noting the differences between British, Anglo-American and continental international lawyers, Grewe raises the way in which continental lawyers embodied this mixture of positivism and liberalism.

“In contrast to their influence on almost all other areas of international law, nineteenth century British international lawyers failed to acquire a dominant influence in respect of theories of law-making. Instead, they remained overshadowed by the more thorough reflections of continental theorists. The persuasive strength of the continental approach rested not least upon the fact that the state which the positivist thinkers had in mind, that single decisive will with which they entrusted the creation of law, was regarded as the ‘active promoter of reform and progress in the realisation of liberal ideas’. At the same time, this state, as nation-state, was the embodiment of all those aspirational tendencies and currents which formed the ‘nationalism’ that was so significant for the nineteenth century.” (Grewe, 2000: 511)

Differences between international lawyers can be explained by the variation in monarchical regimes (Kelly, 1992: 275). A parliamentary or a constitutional monarchy has obvious differing consequences for theorizing about legitimacy, state recognition and intervention. Its effect can be seen in the important debates on the admission of non-European or ‘semi-European’ states in the society of ‘civilised nations’, such as the Ottoman Empire¹³¹. In effect, continental lawyers tended to adopt a more Hegelian and historicist positivist approach. On the other hand, a large percentage of Anglo-Saxon lawyers started from a natural law premise (Grewe, 2000: 494; 500). However, natural law eventually collapsed in the second half of the 19th century, with the influence of Anglo-American writers such as Austin.

British international lawyers were particularly critical of the continental tradition of the balance of power. Anderson describes Britain as mostly sceptical because of being “geographically separate from the European mainland and hostile by long tradition and deep-rooted popular feeling to involvement in European problems” (1993: 190). This explanation is not sufficient. The previous section argued that England’s social property relations, marked by the balance between the Crown, the Parliament, and the judges and lawyers of the common law constitute a more solid basis to start explaining the specific trajectory of Britain’s influence on IL. Moreover, this section argues that this trajectory was pursued by

¹³¹ If these debates continue to this day with the problematic admission of Turkey into the EU, and their link to populist claims about the Islamisation of Europe, it only adds weight to the proposition that legal strategies of expansion are foremost socially contested sites of struggle.

British international lawyers' particular approach to legal practice and doctrine. It concludes by suggesting that British universalism transposed the common law nexus between landowner individual, state and private property to a 'universal' IL nexus between territorial state, European civilisation and divided forms of sovereignty.

In terms of legal and political thought, this meant the shift after Locke and 18th to 19th century utilitarianism (e.g. Smith, Bentham) to a new conception of *terra nullius*, or vacant land. For Pagden (2003: 181), this period developed two new rights essential to British-led international relations: the right to the *use* of vacant lands, and the right to punish those transgressing the law of nature. However, the first and most important of these two rights, that regarding land improvement, was predicated on practices and debates specific to English state formation, i.e. enclosures as a strategy of primitive accumulation.

We will now turn to the practices of IL as evidence for the link between enclosures and extraterritoriality. In effect, extraterritoriality represents one of the forms of divided sovereignty indicative of the transposition of the common law nexus to IL.

International Legal Practices (late 19th century)

The second section showed that the rise of the English capitalist social property regime depended on the particular structure of the common law, its effect on peasant and landholding classes, and on the ability of English lawyers to retain a form of independence vis-à-vis the 'Crown in Parliament'. Moreover, it stressed the importance of social relations of primitive accumulation on the development of political theory.

The third section discussed concepts and trends in 18th to 19th centuries international legal thought. This final section looks at how these social relations and political debates constructed the emerging system of IL. As such, it presents two events: the role of Britain in the structure of the modern European states-system, and the influence of imperialist legal institutions in shaping territorial sovereignty through the strategy of extraterritoriality.

The British 'Paper Empire'

England's growing ascendancy in the 18th century was largely driven by unfettered commercial and colonial expansion in the British Isles, the Caribbean, and North America. This first phase, the 'Atlantic Empire', was followed by a more extensive and widespread phase from the mid-18th to early 20th centuries, covering India, South Asia, Australasia, Africa and the Americas (Armitage, 2000: 1-2). If the first phase exported Britain's agrarian innovations and logic of land improvement, the second phase displays a more variegated

and compromised pattern between two imperatives of expansion, market extension and political control of territory.

“The imperial power had learned some lessons from its attempts to establish an empire that depended on the force of economic imperatives as yet neither expansive nor powerful enough to impose themselves successfully on distant colonial economies. The combined effect of these differences was the installation of an empire in India that had more in common with non-capitalist empires than had England’s earlier settler colonies in Ireland and America, or even the plantation colonies in the Caribbean. (...) [T]he empire was essentially non-capitalist in its logic. Yet the transition from one to the other, and the subsequent evolution of British imperial rule, were shaped by Britain’s capitalist development.” (Wood, 2003: 110)

Wood goes on to argue that, in contrast to the first phase, Britain’s imperial rivals principally conducted the 19th century expansion of capitalist imperatives by economic means. Whereas Britain’s consumer-led industrial revolution was driven by internal changes in its social property relations, France and Germany, in response to external pressure from the British Empire, “mobilized their economies to strengthen their positions in inter-state and inter-imperial rivalries” (2003: 119). Thus, military needs drove state-led industrial development (iron, steel and engineering), focused on the production of military equipment and improvements in transport and communication (*ibid.* 122).

In other words, the 19th century expansion of capitalism was characterised by the combined encounter of two processes. On the one hand, Britain’s home-driven economic imperatives were tampered by the necessity of extra-economic forms of imperialism (India, Africa). On the other, British capitalism pushed inter-imperial rivalry and state-led military industrialisation in continental Europe. “War was the principal motivator, as it had been so often before; but British capitalism, and the industrialization that it spawned, had altered the rules of the game.” (Wood, 2003: 120). Before discussing this argument, some background is necessary.

In 1815, the Congress of Vienna brought together the victors of the Napoleonic wars, after the Treaty of Paris, in 1814, settled France as a vanquished power. The Congress, and the following meetings it planned (Aix-la-Chapelle in 1818, Troppau in 1820, Laibach in 1821 and Verona in 1822) informally established what is known as the Concert of Europe, composed of Austria, Prussia, Russia, Britain, and in 1818, France. Conventionally read as a return to the pre-1789 European order, albeit with important innovations in the concept and practice of the balance of power (e.g. Clark, 1989: 118), the Concert was an ‘experience in political science’ and a response to the ‘new map of Europe’ (Butler & Maccoby, 1928: 353). As such, its ambitions as a permanent body collapsed under the pressures of increasing

nationalist, inward-looking and irreconcilable types of governments¹³², but also, crucially, due to British conservatism and scepticism. The Concert system ended with the Crimean War, settled by the 1856 Treaty of Paris. This marked the beginning of a more technical, informal and better-organised series of conferences (instead of congresses) focused on non-political matters (e.g. commerce, regulation of international rivers and other new means of communication). Despite the structural and quantitative changes in the means and subject matter of IL (Nussbaum, 1954: 202), the period 1870-1914 is said to mark the return of a classic balance of power system (Clark, 1989: 130).

What role did 19th century IL play in this expansion, and does it corroborate Wood's argument? Can it be assimilated to 'the rules of the game', or is Wood not too hastily falling back into an instrumentalist conception of IL? At a primary level, IL can be conceived of as an extra-economic means to further accommodate Britain's imperial expansion. In this sense, the transition to a 'paper empire', led by administrators and legal advisers at home and in the colonies (Johnston, 1973: 283), coincides with the politically and militarily tampered character of the second phase of British imperialism. However, this 'extra-economic' condition can be misleading, as the main innovations of 19th century IL consisted of open (multilateral) treaties, the increasingly technical regulation of international *non-political* matters through subject-specific conventions, the creation of non-governmental institutions such as the Red Cross (1863), the Universal Postal Union (1875), and last but not least, the rise of international arbitration. Thus, forms of IL can more accurately be understood as available strategies to 'neutralise' the political-military state-led imperialism of Britain's European rivals, but also as an increasingly more complex arena of social struggles where these inter-imperial tensions could be played out.

In this second sense, IL and its novel means of juridical expansion can be analysed as shaping what counts as 'internal' and 'external' to economic and political spheres rather than being determined or instrumentalised by them. In other words, it helped to categorise legitimate action as political or economic, by creating 'new' mechanisms and spaces for inter-imperial rivalry to compromise on what was considered legitimate intervention in these domains. All authors concur that the attribution of sovereignty to new territories was an affair between imperial powers. Specifically, the Berlin Conference institutionalised this attitude by making Africa and its emerging entities *objects* of IL (Fisch, 1988). This of course had the double effect of maintaining and/or increasing and legitimating the importance of the Great Powers as superior *subjects* of IL (qualitatively and quantitatively / institutionally and

¹³² For Butler & Maccoby (1928: 370), "the differences which existed in the types of governments which engineered it [Congress of Vienna]" constituted the main reasons for its long-term failure. If the Holy Alliance (Austria, Prussia and Russia) was composed of autocratic monarchies, Britain and France were constitutional monarchies where Foreign Offices and diplomats had to contend with 'free' presses and Parliaments tightening their rein and thus limiting to some extent costly adventures or delusions of 'Concert' grandeur.

geographically). Thus, the 1884-85 Berlin Conference, far from developing substantially innovative and progressive legal structures, instead maintained or embedded IL into a Eurocentric and imperialistic system of international relations and territorial sovereignty (Fisch, 1988). However, it did so as ‘universal’ institutions, by enabling agreement and institutional standards for European inter-imperial rivalry and for societies to prosper according to the *good management* of international affairs. This is the inherent ‘logic’ Raustiala (2009) mistakenly traces back to Westphalia.

The ability of these clashing forces (economic arrangements, political coercion and legal abstraction) to merge as one can be explained by the legacy of internally-driven British capitalist hegemony. This merging was based on a symbiotic arrangement between law and political expansion that permitted the development of economic imperatives while maintaining a strong unified and central state. To substantiate this last central claim, the practice of establishing extraterritoriality will be looked at in more detail.

From Land Improvement to Extraterritoriality

The British position can be analysed through the problem of extraterritoriality that occupied jurists, legal advisers and colonial administrators, at home and abroad, to a significant extent. The dominant scepticism concerning the potential or genuineness of ‘European Concert’ consensus can certainly be attributed to Britain’s specific geopolitical conditions. These consist of its concern for threats of aggression rather than danger of revolutions, or of its interest in the external freedom of members of the states system rather than the internal conditions of the parts of the society of Europe (Clark, 1989: 125). Nevertheless, scepticism was also due to confusion and uncertainty among British legal actors¹³³. Legal advice was neither centralised, consistent or coherent (Johnston, 1973: 283).

If the British carried with them a definite sense of cultural and juridical superiority (“they prided themselves on their system of law and jealously wanted to take it with them wherever they went in the world” (Johnston, 1973: 12)), it nevertheless took them time and administrative quagmires to put this into effect. Moreover, striking the right balance between theory and practice was a rarity. In general, a pragmatic, *ad hoc* approach was taken, headed by the Foreign or Colonial Office. In most cases of territorial acquisition, a few British

¹³³ Government administration equipped itself with permanent legal advisers, law officers of the Crown, and a Lord Chancellor (highest judicial functionary) as sources of legal advice (the latter two being external). Next, two separate institutions were central to the development of international policy and legislation, the Foreign Office and the Colonial Office. These were dominant over the former individuals though conflicts between them also arose. The Foreign Office was criticised for its inefficiency, while law officers were given bad press for taking time and a lack of organisation. The third important set of actors were the consuls and other various ‘men-on-the-spot’ who carried the expansion of the British Empire in a rather disorderly fashion, and which consisted of “slow, often imperceptible, seeping actions by small groups and individual adventurers – traders, merchants, missionaries, sailors, whalers, slave dealers, vagabonds, ruffians.” (Johnston, 1973: 14).

men arrived on a new territory, reported back asking for protection, which led to a treaty or agreement with native populations. This treaty very often meant an extension of British influence, and through either unequal terms, conflicts with contending powers or changes in international legal principles such as during the Berlin Conference, eventually became an extension of British sovereignty. But full sovereignty through annexation was not sought after by British administration in the early 19th century. This only came gradually, as the pressure of inter-imperial rivalry (Wood's second phase of Empire) and, as noted in the previous section, continental jurists' lead in matters of international law-making¹³⁴ forced Britain to commit itself more explicitly. The 1843 Foreign Jurisdiction Act, a landmark piece of legislation confirming the extraterritorial sovereignty of British and British-protected subjects across the globe, can be used as a marking-point, though it was only in the 1880s and 90s that the British administration and its associated jurists took legal imperialism seriously as a cornerstone of its hegemony. This coincided with the infamous 1884-5 Berlin Conference, known as the 'Scramble for Africa'.

To understand this gradual change of policy, the necessity of producing the Foreign Jurisdiction Act and related legislation (such as Orders of the Council) was driven by the need to protect British subjects.

"Protestantism, oceanic commerce and mastery of the seas provided bastions to protect the freedom of inhabitants of the British Empire. That freedom found institutional expression in Parliament, the law, property and rights, all of which were exported throughout the British Atlantic world. Such freedom also allowed *the British, uniquely, to combine the classically incompatible ideals of liberty and empire.*" (Armitage, 2000: 8, added emphasis)

If so, it is argued here that British administration also had to combine this protection with the need to transform Britain's innovations in production, demanding an ever-wider consumption market for its goods, while also adapting its innovations in practices and conceptions of land improvement. A solution to this problem was to accentuate the differences between land and sea sovereignty, thereby rekindling an old problem of international legal theory dear to Britain while moving away from continental legal expertise, viz. mercantilist and absolutist forms of juridical expansion, or jurisdictional accumulation.

Thus, extraterritoriality, although originally a concern for individuals ('men-on-the-spot', diplomats, ambassadors, merchants) and therefore logically belonging to private IL (as associated to problems of conflict of laws), was turned into an issue of public IL, as it led to reconfigurations and thereafter standardisation of state sovereignty. It became a strategy of

¹³⁴ It is important to recall the continuing influence of absolutist (or personal) and mercantilist (heavily state sponsored) continental foreign policy throughout the 19th century, especially in Bismarck's Germany. His famous 1884 speech (*in* Grewe, 2000: 469) is characteristic of this legacy.

expansion, rather than a reciprocal mechanism for regulating differences, as in the late Middle Ages. Indeed, capitulations and treaties dealing with issues of extraterritoriality existed as far back as the 10th and 11th centuries, notably with the Ottoman Empire. This is what has been designated as 'medieval extraterritoriality'. However, their transformation in the 19th century is what needed to be explained in terms of the broader and more fundamental changes to the international system, namely capitalist expansion. As shown, one of the central aims of 19th century extraterritoriality was to distance British strategies of territorial expansion from continental strategies of jurisdictional accumulation, which until then had the upper hand in determining forms of overseas sovereignty¹³⁵. For this, British jurists had to go against the Austinian and pragmatic consensus in legal theory and accept the divisibility of sovereignty. This resulted in the increase in legislative acts and involvement of a more and more efficient legal bureaucracy for the colonies, i.e. the 'paper Empire'. This phase came in its own for the Berlin Conference, after which British actors took the lead in defining IL and using it as a 'soft' mode of intervention and balance of power. The importance of the debates over the notion of protectorate is similarly telling of the power struggles between Britain and the other Great Powers (Johnston, 1973; Gong, 1984; Fisch, 1988).

Linking these points back to the previous discussion, these processes should be understood as manifestations of the peculiar combination of British economically driven capitalism with the reality of confronting a primarily non-economically driven European continent that had developed a particular expertise in strategies of territorial expansion. In short, extraterritoriality explains the standardisation of the concept of universal civilisation as a balancing act against continental imperial rivalry (Johnston, 1973: 313 & 318; Gong, 1984: 58-61).

Conclusion

As a sociological study of the history of human rights concludes (Stammers, 2009: 70-101), pre-20th century debates are mostly ignored by mainstream IL historiography. In effect, many of the debates recounted previously are not seen as belonging to the heritage of international legal thought, although they are expressly concerned with rights, individuals and their relationship to the state. This chapter argued that these are fundamental to the formation of British international lawyers, and hence of 19th century theories of IL. However

¹³⁵ A perfect example of where the tensions and differences between French and British conceptions of extraterritorial sovereignty, and between their strategies for expansion and implementation of extraterritorial rights is that of the status of Madagascar during the nineteenth century (Liu, 1925). Both states engaged in diplomatic and military conflicts over the territory of Madagascar, arguing in the British case, for the precedence of previous extraterritorial regimes, over, in the French case, the precedence of sovereign rights acquired through military occupation. These two positions reflect the differences between Britain's more open and economically orientated forms of expansion, and France's attachment to more traditional and politically determined strategies of jurisdictional accumulation.

removed or deemed marginal by the classical and Marxist canon, these debates showcase the specificity of British influence as separate to that of the DPE. They explain the 'isolated' legal traditions from which late 19th century processes were shaped.

The legacy of England's agrarian capitalism for the emergence of 19th century public IL consists in an early modern symbiosis between common law and political expansion, permitting the development of economic imperatives while maintaining a strong unified and central state. 19th century international legal doctrine and practices, i.e. extraterritorial sovereignty and theories of liberal universalism, reveal this legacy through the establishment of institutional legal standards, enabling inter-imperial consensus. This general consensus contributed significantly to the long-term structural hegemony of European nation-states over non-European peoples, notably by standardising state sovereignty and strictly defining the subjects, objects and terms of their relationship in IL.

Crucially, the chapter argued that these novel ways of solving intra-European rivalry while legally enshrining European global ascendancy are largely a product of the British model of capitalist expansion. Concomitantly, through 17th to 19th century international political thought, the concept of land improvement had to be translated for public IL into 'civilised sovereignty' as a *sine qua non* of modern territorial sovereignty. Extraterritoriality, as a strategy of capitalist accumulation, was used to this end. All this, albeit, stands through its symbiotic altercation with contending European strategies of jurisdictional accumulation. Thus, the logic of managing legal differences between states is a product of British universalism and capitalist accumulation. It is not a vestige of Westphalian sovereignty, which in fact, it was struggling to overcome or dominate.

Finally, this chapter contributes significantly to the argument that, *contra* the commodity form theory of law, legal social relations, once diffused and internationalised, constitute simultaneously a vehicle for and a challenge to capitalist expansion: in the former case, through the institutions of the common law, and in the latter, through the survival of radical debates centred on private property rights. Consequently, the effect of the 16th to 17th century transition to capitalism in England has crucial theoretical consequences for understanding the relationship between modern IL and capitalist processes.

CONCLUSION

IL, OR THE POLITICS OF STRUGGLE AND ACCUMULATION

From Capitulations to Judicial Globalisation

What do the comings and goings of extraterritoriality tell us about the construction of public IL? From its 'rise and fall' in the 19th century (Liu, 1925) to its 'fall and rise' in the 20th (Raustiala, 2009), a new global order has shifted judicial practice and academic discourse, creating the conditions for an American "sort of extraterritorial bubble" (*ibid.*: 230).

At the same time, "[a] territorial age did not simply give way to an extraterritorial age; extraterritoriality was instead *transformed, expanded, and reconfigured* over history to meet the challenges of a new great power in a new international order." (*ibid.*: 242, added emphasis). In effect, Raustiala tries to capture the complexities of the history of extraterritoriality. By doing so, he rightfully asserts the relevance of this history for understanding the increasing legalisation of the contemporary world.

Nonetheless, the present study questions the 'transformations, expansions and reconfigurations' that mark conventional studies' continuities and ruptures. The focus is placed instead on extraterritoriality's impact over territorial, or 'Westphalian', sovereignty, rather than its impact over the scope of U.S. constitutional law, as in Raustiala's analysis. This move is crucial so as to widen, geographically and chronologically, the field of enquiry behind the historiography of extraterritoriality.

However debated, mythologised, or redefined, the concept of territorial sovereignty remains at the heart of contemporary theories of IL and IR. Looking at extraterritoriality provides an alternative angle to understand the evolution of territorial sovereignty and the dilemmas it continues to generate. Through this angle, neglected aspects of the institutional and discursive construction of modern sovereignty are revealed. These consist in *socially wide* and *geopolitically differentiated* struggles, fought to maintain, expand or create forms of jurisdiction.

These two axes (one socially vertical and the other geographically horizontal) allow for a process-driven historical sociology, in a bid to move away from structural analyses in IL and IR. Firstly, the thesis contributes to theories of IL by constructing an alternative genesis of judicial globalisation. Specifically, the association between judicial globalisation and economic globalisation is reconsidered; as a central mechanism of judicial globalisation, the origins of extraterritoriality are relocated in the English-British expansion of capitalism. Secondly, the thesis contributes to theories of IR by exploring extraterritoriality and different forms of juridical expansion as essential processes of state formation and colonisation.

Through this inter-disciplinary approach, the study addresses two audiences, Neoliberal Institutionalists in IR/IL and Marxist theories of IL. Speaking to the former, chapter one highlights the dissonance between the practice and concept of extraterritoriality, as understood by Neoliberal Institutionalist scholars. This dissonance consists in assuming that extraterritoriality, although specific in form to different periods and conditions of hegemony, retains an intrinsic function of 'managing differences' between equally independent sovereign states. This function is traced back to the 17th century and the emergence of 'Westphalian sovereignty'. Accordingly, the concept of extraterritoriality is associated with a large variety of practices since the early modern period. This broad claim reifies judicial globalisation as a universal and inevitable structure of contemporary international relations. In short, it mistakenly identifies the points of continuity and rupture in international legal history. Consequently, this impedes an understanding of the effects and potential of structure and agency in today's global order.

Specifically, Neoliberal Institutionalism's normative defence of judicial globalisation brands critiques and social movements that contest the liberal paradigm as illegitimate. Providing an alternative genesis of the process of extraterritoriality enables fruitful comparisons between 19th century and contemporary IL. For example, both these orders legitimise the repression of political dissent: whether by 19th century communists and anarchists, or contemporary Anonymous and Occupy protestors, questioning the jurisdictional bases of the social contract remains outside the brief of judicial liberalism. Aside from the need to historically account for these struggles and debates, this exclusion of marginal politics and of their critique of the status quo deserves a deeper investigation.

Explaining their exclusion on the grounds of a preponderant conservatism or elitism in the field of IL should be resisted. For one, exclusion on such grounds would be destructively paradoxical for the liberal paradigm, since judicial globalisation depends on innovating extraterritorial mechanisms that expand and create new layers of jurisdiction. Secondly, if commercial interests¹³⁶ and inter-judicial competition remain the chief impetus behind these mechanisms, as top-down rather than bottom-up processes, co-opting innovating and critical ideas from contending social classes and movements becomes a necessary strategy for securing the links between social groups and concepts of extraterritorial jurisdiction¹³⁷.

However, if more radically progressive or critical ideas become co-opted, their social origins and actors remain mostly excluded as bases for reconstructing political legitimacy.

¹³⁶ This is corroborated by the fact that antitrust regulation remains, since the beginning of the rise of extraterritoriality in the late 20th century, the prevailing domain in which this practice occurs, in terms of legislation and cases.

¹³⁷ These links have been put to the test recently with the popular discontent over offshore finance, a predominant manifestation of extraterritorial jurisdiction and expansion in the late 20th century. The point here is that it remains crucial for state actors and institutions to legitimise these practices in the public eye, for which traditional principles of sovereignty appear obsolete. This justifies the need to adopt a discourse of judicial globalisation that incorporates new or sociologically more attractive and popular forms of transnational engagement.

Concepts of 'networks' and 'general assemblies' (*ad hoc* forums or participatory decision-making), emerging in the nineteen nineties from a critical literature (e.g. Hardt & Negri, 2000) and transnational activists (e.g. ATTAC¹³⁸ and the alter-globalisation movement), are now essential components of economic and judicial globalisation discourse. This liberalisation is an example of how, in a Gramscian sense¹³⁹, counter-hegemonic movements and ideas become co-opted by dominant or hegemonic actors and institutions. In other words, judicial globalisation is a narrative of international legal order that captures important social changes, but narrowly reconstructs them in the interests of dominant classes and institutional actors.

This brings us to the second audience this thesis engages with, Marxism in IL. Specifically, chapter two is concerned with a current 'liberal dilemma' on how to theorise legal agency in the face of capitalist legal institutions and discursive practices. In light of the above research, the chapter aims to contribute to exploring the agency of legal strategies of expansion. Against the formal and homogeneous reading of international legal history expounded by the commodity form theory of IL, the PM approach developed focuses on the dynamic aspect of state formation and jurisdictional claims, rather than on the state as an expression or form of social relations. It thereby highlights the jurisdictional struggles for claims to legitimacy in the construction of international legal orders, and concludes on the spatial and temporal heterogeneity of juridical expansion. This heterogeneity is expressed by concepts of early modern jurisdictional accumulation as non-capitalist strategies of territorial and institutional expansion.

If the differences between the concepts of jurisdictional accumulation and geopolitical accumulation are more flexible, both concepts however remain distinct from that of primitive accumulation. The case studies on Spain and France substantiate the argument according to which strategies of jurisdictional accumulation remain geared to the *existing* constitutive relation between the juridical and political¹⁴⁰. In other words, strategies of jurisdictional

¹³⁸ ATTAC, "the 'Association pour la Taxation des Transactions financière et l'Aide aux Citoyens' (Association for the Taxation of financial Transactions and Aid to Citizens) was founded in France in December 1998 after the publication in the *Monde Diplomatique* of an editorial entitled 'Désarmer les marchés' (Disarm the markets) that launched the notion of creating an association to promote the Tobin tax. (...) The organization expanded very rapidly into the rest of the world with an ATTAC network around an international charter set up in 1999. Today, the association is active in some 40 countries, with over a thousand local groups and hundreds of organizations supporting the network." (ATTAC website, 2012)

¹³⁹ Albeit very briefly in its discussion of Cutler (2003) in chapter two, this study has not engaged with the Gramscian or neo-Gramscian strand of Marxism and historical sociology, derived from the works of Antonio Gramsci (e.g. Gramsci, 1998). This is not to deny its importance for both disciplines, though its influence on IR theory is more pronounced (e.g. Cox, 1986; van der Pijl, 1984). Still, the relevance of Gramsci's concept of 'war of position' i.e. the role of ideological emancipation and hegemony in Western bourgeois classes, is logically attractive to international lawyers (e.g. Cutler, 2003). If this study has not been able to fully discuss the implications of these concepts for the early modern history of extraterritoriality, their less controversial use in the present discussion of contemporary problems is an acknowledgement of their importance.

¹⁴⁰ In each case study, though probably most importantly the Spanish, the religious dimension plays a significant role, making this formulation seem too reductive. For reasons of space and clarity, this dimension has not been overly emphasised throughout the chapters, though it remains crucial in terms of the political debates linked to different confessional identities, notably in the Reformation and Counter-Reformation period. However, since the

accumulation did not in themselves lead to transformations, as a whole, of the juridical, political and economic relations of targeted or emitting societies. They did not lead to the types of transformations in the modes of production that were to arise in England and wherever the English system of common law and land improvement expanded to. There, in contrast, primitive and capitalist accumulation affected the productive sphere of social relations. In other words, chapter two argues for the need to distinguish between legal strategies of expansion that 'organically' and innovatively reshaped societies, and those that did not. Hence, jurisdictional accumulation is distinguished as a form of territorial abstraction and expansion that fixes or extends the power of the emitting state, institution or sovereign, without the need to transform the (re)production of capital.

In sum, this thesis reconceptualises the continuities and ruptures of extraterritoriality. Contrary to existing studies, it does so according to the differentiated state formations and transitions to capitalism in Western Europe, as the bedrock of territorial sovereignty. Thereby, the concept of territorial sovereignty is to retrieve a part of its social and legal history.

More precisely, chapters three, four and five found that extraterritoriality was not a novel strategy; its early modern history consisted of heterogeneous and overlapping trajectories. 19th century extraterritoriality was explained by its early modern heritage in the processes of English primitive accumulation, but contrasted to continental strategies of expansion previously developed by Spain and France. Moreover, although these have also been conventionally characterised as extraterritorial regimes, they also differed from earlier regimes embodied by late medieval extraterritorial treaties, or Capitulations.

Thus, three important ruptures can be discerned from the preceding discussions, distinguished by the succession of early modern, modern and late modern periods. The first early modern rupture arises from the following question: why did late medieval extraterritorial regimes move from the regulation of *reciprocal* and *personal* to *accumulative*, hierarchical and more *abstract* power relations?

Starting from the 16th century Hispanic kingdoms and their domestic and overseas expansions, chapter three argues that sovereigns, scholars, ecclesiastics, and *conquistadores* shifted from medieval extraterritorial regimes (reciprocal and administrative) to extraterritorial rights and treaties expressing more virulently the various shifts in power of the Castilian Crown. In effect, these shifts consisted in military, mercantilist and religious struggles for jurisdictional expansion, emerging more prominently between European sovereigns and non-Europeans. These struggles, which played a crucial part in building a narrative for the origins of IL, were argued to be better accounted for as specific relations of

author believes this limitation does not negate the overall argument, the religious aspect of the history of extraterritoriality has, for the time being, been bracketed.

jurisdictional accumulation, so as to capture their particular social, political and economic contexts.

Another crucial distinction was made for this period; on the one hand, the relationship of Christians to infidels around the extraterritorial struggles played out in the Mediterranean basin and the Levant; and on the other, the relationship of Christians to 'newly discovered' conquered lands. Indeed, there were no extraterritorial regimes as such in the latter, but new doctrines and practices of jurisdictional accumulation, which if modeled to a certain extent on the *Reconquista* and the Crusades (and their regimes of extraterritoriality), nevertheless required innovative means of exploitation (e.g. *requirimiento*, *encomiendas*, theories of just war). Moreover, these relations departed from previous forms of geopolitical accumulation, which as such did not capture their crucial legal nature and the role of this dimension in state formation and colonisation.

Hence, the late medieval notion of extraterritoriality remains categorically different to early modern and contemporary notions. It consisted in reciprocal relations, borne out of treaties and customs that mostly regulated commerce and relations between traders and foreigners in a world of parcellised and overlapping sovereignties. If some of these regimes of reciprocal extraterritoriality survived, such as in Spain as late as the 19th century (Liu, 1925: 31), these should be distinguished from jurisdictional accumulation, i.e. (mostly colonial) practices that prompted the need for more elaborate and exploitative concepts and institutions for expanding the rights of sovereigns.

The sociological relevance and application of this concept was corroborated by the case study on 17th and 18th century France. This period of hegemony was marked by a more complex patchwork of sovereignties and jurisdictions, and hence of legal strategies and struggles to maintain or extend them. This was significantly the case, not only inside the fragmented French kingdom, but also on the European and overseas fronts. Chapter four thus shows the difficulties and varieties of forms of jurisdictional accumulation elaborated by the Crown, French mercantilists, local jurisdictions and intellectuals until the early 19th century. Again, the specificities of the juridical, political and economic contexts, embodied in France's contested social property relations and their colonial exports, marked its unique role in the construction of the DPE. This international legal order is hence to be understood as a particular period with its own rules for reproduction, especially in terms of inter-dynastic struggles and the survival of a Westphalian or continental regime of diplomacy and absolute state sovereignty, in the face of an expanding and more innovative British system of rule.

However, this order did not resist indefinitely. The second important moment of rupture, marking the move to modernity, occurs with the 19th century expansion of British capitalism. The driving question behind it is thus: how did the economic and political revolutions of the 19th century affect the accumulative extraterritorial strategies of international actors? In

effect, the 19th century's second imperial phase led to a different international order and process of accumulation. Jurisdictional struggles were henceforth determined by the separation between political and economic spheres, the influence of liberal political economy, the common law system and, last but not least, the concept of land improvement. Chapter five argues that 19th century forms of extraterritoriality, mostly driven by Britain and its cohort of imperialists, adventurers, settlers and administrators, are better understood as forms of enclosure. These practices were developed in the 16th to 18th centuries, and were made possible by a particular symbiotic model of expansion expressed by the relationship between the common law, the state and landowners. This model was replicated on the international scene through the influence of the concept of land improvement, as a development of concepts of *terra nullius* and earlier forms of colonisation. Thus, we hereby have a much more differentiated and overlapping picture of the history of extraterritoriality. One where the continuities and ruptures do not follow chronologically and geographically linear paths of development, but where jurisdictional struggles are shaped by interdependent social property relations and interdependent spatial and temporal trajectories between various international actors.

The third crucial point of rupture is the most recent. To understand it, it is useful to ask how the 'new' extraterritorial relations and regimes differ from those that disappeared, if so, with the classic late 19th century age of imperialism. This question has not been a core part of this study, though it emerged in chapter five in terms of the paradox of British universalism, and how this new international order worked to efface the coercion and exploitation that accompanied its rise. Moreover, considering its role in justifying and prompting this research, the final paragraphs will discuss some implications as to how this thesis can answer the problems of abstract universality and the 'liberal dilemma'. In short, the hypothesis that logically emerges considers the continuity between recent forms of extraterritoriality and the 19th century rupture and entrenchment of extraterritoriality as capitalist accumulation.

Implications for 21st Century Jurisdictional Struggles

Locating the early modern actors and politics of extraterritoriality, and distinguishing this practice from other legal strategies of expansion, might seem far away from the complexity and explosion of contemporary extraterritorial cases. However, this thesis maintains that the current discourse of judicial globalisation needs to be resituated in the alternative historical and theoretical framework hereby developed.

In effect, the thesis revealed the often-ignored role of legal strategies of expansion in international socio-political transitions. This role consists in reproducing but also innovating

rules for accumulation. This process generates jurisdictional struggles where the boundaries between legality and legitimacy become more blurry and open to debate. The need to account for this role, and hence for focusing on extraterritorial actors and their political implications, is most evocatively illustrated by the open case on the status of Guantanamo Bay (Raustiala, 2009; Kayaoglu, 2010). However, the struggles surrounding the case of the ACTA treaty and the related SOPA and PIPA acts, if less dramatic and less discussed, nevertheless provide a more socially varied set of actors and issues that deserves more analysis.

One practical concern, which is formulated here at a general level of political discourse¹⁴¹, is whether the process of extraterritoriality opens up or closes more democratic legal strategies to face the profit-maximising imperatives of economic globalisation. Most simply, does judicial globalisation contain economic globalisation?

On the one hand, the rise of extraterritoriality can maintain capitalist imperatives by helping dominant actors avoid established and thereby less expedient and predictable regulatory mechanisms. On the other hand, the extraterritoriality of the SOPA and PIPA acts has forced leading states to listen to, if not abide by, the voices of a wider international civil society concerned by internet freedom. Needless to say such questions of democratic accountability remain too broad here. However, they point to the need for further research on the causes and consequences of the latest 'extraterritorial bubble'. Specifically, their present discussion at least implies a rejection of claims adopting a more neutral conception of international legal mechanisms, and which ignore the influence of power politics, ideology and class agency.

A preliminary answer from the above findings proposes that extraterritoriality is a risky strategy for dominant legal actors, and lies somewhere in between these two concerns for democratic gain or deficit.

Firstly, as capitalist accumulation, extraterritoriality provides an alternative means of securing legal and political interests (e.g. control of the internet and online information) that avoids the obstacle-laden circuits of post-1945 international legal institutions. It does so by enabling the expansion of jurisdictional privileges while maintaining domestic sovereign integrity. For this, the discourse of judicial globalisation is essential as it justifies a new order for the lasting problem of the sources of IL.

Moreover, however problematic the liberal paradigm of a global rule of law is in terms of the exclusion of marginal social forces, another set of preoccupying dynamics runs in parallel. These dynamics are driven by commercial and neo-imperialist interests, led

¹⁴¹ This is meant in contrast to considerations made at a more technical and legal level. It should be recalled that this thesis is not intended as a discussion of the legal technicalities of extraterritorial cases, but rather of their reception by and impact on academic and less academic debates revolving around the shifting relationships between law and politics, IL and IR.

respectively by transnational companies and entrepreneurs, and by liberal and conservative politicians and intellectuals who argue for the need to maintain the U.S. and/or the West as the leading military and economic power. Thus, developing extraterritorial regimes to their advantage (i.e. in a Realist conception of a zero-sum game) is an obvious strategy for them to consider.

This strategy has become more important as 'advanced' capitalist states remain in recession or with very low growth forecasts, and thus having to depend financially on emerging markets (BRICS¹⁴²). It has therefore become essential for the old West to maintain expertise, or comparative advantage, in political and legal domains (e.g. institution building; networking; allowing access to, publicising and exporting the 'better quality' of Western legal systems¹⁴³).

Secondly, however, extraterritoriality and its propensity for jurisdictional struggles provide space for counter-arguments and counter-movements to emerge. It does so either by replicating bids to extraterritoriality as the EU and other OECD-G8 countries have done or, by allowing more radical challenges to the legitimacy of existing rules and legal orders, as Anonymous groups or the Occupy movement, for example, are trying to do. In any case, if these more radical attempts are less prone to success, they have undeniably influenced the socially wider terms of the debates and means of protest. A striking example of this influence is the picture of Polish European Members of Parliament wearing Anonymous masks while in session over the voting of ACTA (Warman, 2012). Of course, the previous comments on the liberalisation of critical ideas and movements apply to this case, forcing caution towards any discussion of jurisdictional struggles as emancipatory. Nevertheless, this discussion remains necessary, and deserves more conceptual clarity and theoretical incorporation into critical theories of IL.

To conclude, these preliminary thoughts confirm that debates and instances of jurisdictional resistance, whether in courts or in protests that question the social contract and current democratic process, need to be repositioned in the history of public IL as different types of legal strategies. From 16th century radical political struggles and discourses of rights

¹⁴² The BRICS group consists of Brazil, Russia, India, China and South Africa.

¹⁴³ A recent example is that of self-funded commercial courts in the United Kingdom (UK) hosting major non-UK civil cases, such as the recent case between Russian billionaires Abramovich and Berezovsky (Dowell, 2012). This 'marketing' of Western courts echoes arguments in the 19th century, when extraterritoriality was defended as a necessary exception in the face of sub-standard legal systems, and as a necessary step towards the legal development and 'maturity' of such 'backward' legal systems, especially in the Far East (Liu, 1925: 89). A striking exception and crucial debate over the imperial West's premium on legal expertise occurred in pre-Opium War China. The latter's continued and categorical refusal to accept the extraterritorial sovereignty of Western powers, on the ground that China did possess an elaborate and strictly defined system of law and territorial sovereignty (*ibid*: 80-89), can be argued to have eventually led to the West forcing itself militarily on the region. In any case, if this shows the importance of jurisdictional struggles and extraterritoriality as a part of Western empires' drive to accumulate, it also points to the similarities between 19th century and contemporary arguments for extraterritorial expansion.

(Thompson, 1975; Wood and Wood, 1997), to 19th century revolutionary struggles over social and economic rights (Thompson, 1998; Stammers, 2009), and to the wave of protests across the globe in the early 21st century, claims to jurisdiction remain at the centre of social struggles, and should as such be part of the historiography of IL.

To show this, this thesis focused on the exploitative and coercive types of juridical expansion pursued by dominant classes in the expansion of jurisdiction and the construction of international legal orders since early modernity. By proposing a historical sociology of public IL as a history of legal strategies of expansion, it also hoped to conceptually open what has become an ideologically narrow and socially exclusionary inter-discipline, namely IR/IL.

In addition, historicising the constitutive relationship between capitalism and IL did not theoretically lead to negate the agential potential of law. However, this potential requires constant enquiry and socially based analyses so as to keep the history of legal strategies of expansion open to transitional ruptures and structural continuities. This project is absolutely crucial, since the 'British-led' universalisation of IL has made conceptual opposition to capitalist structures of domination more difficult to conceive in legal and institutional terms. As Wood and Wood note, the separation of political and economic spheres increasingly limits the promises of legal freedom and equality:

"Legal or political freedom and equality, which would once have represented a real danger to propertied classes, have become much less of a threat to economic inequality and exploitation. In such conditions, even universal suffrage leaves fundamentally untouched the purely 'economic' powers created by capitalism." (Wood & Wood, 1997: 135-136)

By ignoring the above history of juridical expansion, the emerging paradigm of judicial globalisation obscures the coercion and exploitation inherent in legal capitalist accumulation. In this obscurity, existing and potential jurisdictional alternatives of social organisation, voiced by non- or anti-capitalist interests, have no choice but to remain illegitimate. Like illegal workers on their own land, these voices are the late modern version of the early modern Commoners. Their claims to jurisdiction are apoliticised in the face of economic imperatives and neoliberal ideology. Therefore, by retrieving the politics and actors at their forefront, this project reclaims the importance of jurisdictional struggles in the past and present of international relations and IL.

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